

San Francisco Law Library

*No.

Presented by

.....

EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



United States
Circuit Court of Appeals
For the Ninth Circuit.

THE ARIZONA AND NEW MEXICO RAILWAY
COMPANY, a Corporation,

Plaintiff in Error—Appellant,

vs.

THOMAS P. CLARK,

Defendant in Error—Respondent.

Upon Writ of Error to the District Court of the United States
for the District of Arizona.

Brief of Defendant in Error.

L. KEARNEY,
Clifton, Arizona,

W. M. SEABURY,
Phoenix, Arizona,

Attorneys for Defendant in Error.

FILED

APR 29 1913

Records of U.S.
Court of appeals
814

No. 2259.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,
Plaintiff in Error—Appellant,
vs.

THOMAS P. CLARK,
Defendant in Error—Respondent.

Upon Writ of Error to the District Court of the
United States for the District of Arizona.

Brief of Defendant in Error.

STATEMENT OF FACTS.

This suit was brought under the Federal Employers' Liability Act, to recover damages on account of negligence of appellant, by which respondent sustained personal injuries.

Both parties to this action are residents of Arizona; that appellant is the owner of a railroad extending from Clifton, Arizona, to Hachita, New Mexico, and maintains railroad yards at said Clifton; that respondent is a locomotive engineer, and as such was employed by appellant in its yards at said Clifton, in charge of a switch engine, on March 15th, 1911, and at which time there was brought into said yards twelve foreign freight-cars of the Colorado and Southern Railway Company, from Grey Creek, Colorado, which were loaded with coke in Colorado and consigned to the Shannon Copper Company, at said Clifton; that from said yards there is a switch

road running a distance of three-quarters of a mile to Shannon Copper Company's smelter, and while the respondent was at said switch and in the act of moving said cars to said switch, in order to deliver the same to said consignee, on March 15, 1911, he was injured by reason of four of said cars which had been left on an incline track of appellant about 600 feet above the point of said switch, without the brakes having been set thereon, and while respondent was moving four of said cars down the appellant's track, and in the act of passing on to said switch, the said four cars which had been left on said incline came running down and collided with said switch engine, resulting in said injuries, and on account of which this action was instituted January 18, 1912, in the District Court of the Fifth Judicial District of the Territory of Arizona, on the Federal side of the court, and thereafter Arizona, on February 14, 1912, became a State, and this action was transferred to the District Court of the United States for the District of Arizona, where it was tried and judgment rendered on November 16, 1912, in favor of respondent for \$12,675.

The Second Amended Complaint, set out in Transcript, pages 47 to 59, upon which this action was tried, is very lengthy, and but very brief reference thereto will be made. It charges negligence in a number of particulars, and alleges that the several negligent acts concurred and were the proximate cause of the injury. A brief summary thereof is as follows:

That appellant was negligent in setting out the

four freight-cars on a downgrade without setting the brakes thereon to prevent their running away and colliding with said engine respondent was operating; that it was the duty of appellant's employees to warn respondent of approaching cars, which they negligently failed to do; that said employees negligently gave a stop signal when none should have been given, and by reason thereof respondent stopped his engine and was caught in said collision; that the roadbed was defective and unsafe, and that appellant did not furnish respondent a reasonably safe place in which to perform said work; that appellant carelessly ran and managed said freight-cars, thereby causing said collision; that respondent was further injured by appellant's neglect to formulate, promulgate, and enforce proper rules for the safety of respondent and his coemployees, and that appellant conducted its works by insufficient signals, material and men, and that it conducted its works by unsafe and dangerous methods; that on account of said collision respondent was severely injured, and for a long time confined to his bed, lost an eye, sustained hip and spinal injuries, three broken ribs, and that said sickness produced pneumonia, which resulted in chronic nephritis; that his injuries are permanent, and have rendered him unable to perform any kind of work; that at the time of his said injuries he was earning \$2,100 a year, which salary he had been earning for fourteen years prior thereto.

Paragraph 2 of the complaint alleges, among other things, that the appellant is a common carrier of freight and passengers for hire between the points

mentioned on its line of railroad.

At the time of respondent's said injuries, Arizona was a territory, and the rule announced pertaining to railroads in territories under said Federal Employers' Liability Act, in *El Paso & N. E. R. Co. vs. Gutierrez*, 215 U. S. 94, Id. 54 L. Ed. 110, is applicable.

The case was properly brought in said territorial District Court on the Federal side thereof (*Friday vs. Santa Fe Ry. Co.*, 120 Pac. [N. Mex.] 316), and under the Enabling Act of Arizona, section 33, and the new Federal Judicial Code, section 64, the case was properly transferred to said United States Court, where it was tried without any question as to the jurisdiction of the Court over the same.

It was not necessary for respondent to have alleged that he was employed in interstate commerce when he was injured. However, the evidence shows that he was so engaged in removing and delivering the said foreign freight-cars to the said assignee, Shannon Copper Company, over said switch, and was clearly within that rule.

Thornton on the Federal Employers' Liability and Safety Appliances, 2d. ed., p. 46, note 12, and pp. 48, 49, note, 12

McNeill vs. Southern Ry. Co., 202 U. S. 543, 50 L. Ed. 1142.

Rhodes vs. Iowa, 170 U. S. 412.

To switch interstate cars is to engage in interstate commerce.

Union Stock Yards Co. vs. United States, 169 Fed. (C. C. A.) 404.

Doherty on Liability of Railroads to Interstate
Employees, pp. 80, 81.

The evidence is voluminous, and shows very clearly that appellant was negligent in failing to set the brakes on the cars set out on the incline track, when its rules so required it to do, and that respondent had no warning of the collision, and that the servants of appellant neglected to secure said cars to prevent their escape, and negligently failed to warn respondent of such danger until too late, and then gave the wrong signal, which aided in bringing about the injury; and the evidence shows it was dangerous to leave unblocked cars on said incline, and that the employees of appellant knew that fact at and before the time of collision, but failed to perform their duty; that appellant failed to promulgate and enforce reasonable rules for the movements of its cars, and, in consequence of all, the respondent sustained his said injuries.

There is some contention that respondent improperly united in his complaint common law and statutory negligence, but such contention is untenable. The Federal statute covers both forms of negligence, and the same may well be blended in one count, and do not constitute separate causes of action.

De Atley vs. Chesapeake & Co. Ry. Co., 201
Fed. 591 (in Pamphlet No. 3 of March 6,
1913).

Colasurdo vs. Central R. R. of New Jersey, 180
Fed. 832, gist 838.

Iarussi vs. Missouri Pac. Ry. Co., 155 Fed. 654.

Appellant contends that respondent's second amended complaint is insufficient, and in relation thereto, has assigned ERRORS I to V, inclusive (Transcript, 628-631), under general and special demurrers, motions to strike, and to make other parts thereof definite and certain.

A sufficient answer to such contention is that the rulings of the Court on said demurrers and motions is not in the bill of exceptions, and cannot be considered.

Ghost vs. United States, 168 Fed. (C. C. A.) 842.

These assigned errors, the action of the Court on such motions, are discretionary.

Deitz vs. Lymer, 61 Fed. 792.

Denver & R. G. R. Co. vs. Wagner, 167 Fed. 75.

It is obvious from the slightest inspection that the demurrers are without merit. The rules of pleading in Arizona are very liberal, and as against a demurrer every intendment will be made to sustain the pleading.

Phillips vs. Smith, 95 Pac. (Ariz.) 91.

Under the Federal practice the same liberal rule attains.

Simpkins' Federal Suit at Law, page 56.

Under the general rules of pleadings the complaint is sufficient.

In an action for negligence, the plaintiff need not set out in detail the acts constituting the negligence complained of.

McLeod vs. Chicago M. & P. S. Ry. Co., 117 Pac. (Wash.) 752.

Nor is the same subject to motion to make more definite.

The Indianapolis etc. vs. Horst, 93 U. S. 291, 23 L. Ed. 898.

Adams Express Co. vs. Aldridge, 77 Pac. (Colo.) 7.

Denver & R. G. R. Co. vs. Vitello, 121 Pac. (Colo.) 113.

Chaparon vs. Portland General Elect. Co., 65 Pac. (Or.) 929.

Plaintiff may allege several acts of negligence in one count where it is alleged that such acts are the proximate cause of the injury, and on trial, proof of any one of such acts shown to have been the proximate cause of the injury is sufficient.

Enid Electric & Gas Co. vs. Decker, 128 Pac. (Okl.) 710, 29 Cyc. 565.

Haley vs. Missouri Pacific Ry. Co., 93 S. W. (Mo.) 1120.

International Glover, 88 S. W. (Tex.) 516.

Fredrick vs. Hale, 112 Pac. (Mont.) 73.

Boireau vs. Rhode Island, 169 Fed. 1015.

A good many cases hold that it is negligence *per se* to permit cars to escape and collide with other cars, as in this case.

Olson vs. Great Northern Ry. Co., 71 N. W. (Minn.) 5.

Troxell vs. Delaware, 180 Fed. 877.

However, this question was properly submitted to the jury to pass upon, there being evidence of such negligence.

The case is made out, if the injury results in whole or in part from the negligence of any of the employees of the company.

St. Louis etc. vs. Conley, 187 Fed. (C. C. A.) 952.

It is negligence to permit cars to run down and collide with others.

Colasurdo vs. Central R. R. of New Jersey, 180 Fed. 835.

Appellant assigned Error VI (Transcript, page 631), in which complaint is made that the Court refused to direct a verdict for appellant at the close of plaintiff's case. There appears to be no merit in that contention.

At the time of the injury the appellant was engaged in the business of common carrier by railroad in the territory of Arizona, and this contention is disposed of by section 2 of the Federal Employers' Liability Act.

El Paso R. Co. vs. Gutierrez, 215 U. S. 94.

And under the evidence and the law hereinbefore cited the appellant was at the time respondent was injured engaged in delivering foreign coke cars to the assignee, Shannon Copper Co., and was engaged in interstate commerce.

McNeill vs. Southern Ry. Co., 202 U. S. 543, 50 L. Ed. 1142.

Further, if there was any error in such ruling it was waived, for the appellant went on and put in its evidence, and did not at the close of all the evidence renew its motion for a directed verdict. It

is the uniform rule that the sufficiency of the evidence to support the judgment cannot be raised in the appellate court, where, as in this case, after the lower court denied the appellant's motion to direct a verdict at the close of the respondent's case, the appellant then put in its evidence and did not at the close of all the evidence renew its motion for a directed verdict.

American Smelting Co. vs. Karapa, 173 Fed. 607.

Grand Trunk Ry. vs. Oliver, 106 U. S. 700, 27 L. Ed. 266.

Roberts vs. Perkins, 129 U. S. 233, 32 L. Ed. 688.

The Columbia etc. vs. Hawthorne, 144 U. S. 202.

Sigafus vs. Porter, 179 U. S. 121, 45 L. Ed. 116.

Appellant contends, under its Assignment of Errors VII and VIII, Transcript, pages 631 to 640, that the witnesses Kelly and Kline should have been permitted to testify, over objection, that respondent had been negligent at other times and places, or that he was habitually negligent. There was no error in sustaining the objection.

“The rule is well settled that when the question is whether or not a person has been negligent in doing, or failing to do, a particular act, evidence is not admissible to show that he has been guilty of a similar act of negligence, or even habitually negligent upon a similar occasion.”

Missouri K. & T. Ry. Co. vs. Johnson, 48 S. W. (Tex.) 568.

Mansfield Coal & Coke Co. vs. McEnery, 91 Pa. St. 185, 36 Am. Rep. 662; 29 Cyc. 619, notes 67, 68; 29 Cyc. 610, notes 23, 24.

Thompson on Negligence, vol. 6, sec. 7792.

Atlanta etc. R. Co. vs. Smith, 94 Ga. 107, 20 S. E. 763.

Towle vs. Pacific Imp. Co., 33 Pac. (Cal.) 208.
21 Ency. Law, 2d ed., p. 518, note 6.

Appellant, under its Assignment of Errors IX to XII, inclusive (Transcript, 640-642), and assigned Errors XIV to XV, inclusive (Transcript, 660-662). All of which pertain to the Court's instructions to the jury, and its refusal to give certain of appellant's instructions; these objections and exceptions are not properly before the Court for consideration, because the fact and truth is that no exception to those instructions, nor exceptions to the ruling of the Court in refusing to give appellant's requested instructions, was taken at the trial, but was in fact taken 20 days after the judgment had been entered on the verdict of the jury. The Transcript of this case shows these facts. Judgment entered November 16th, 1912 (Transcript, 77, 78).

After the jury had retired to consider of their verdict, then for the first time the question concerning exceptions to the charge of the Court arose (Transcript, 492). And while the jury were out considering their verdict, the Court asked the attorneys for the appellant if they thought it necessary to state the grounds of their exceptions to the instructions to the jury, and Mr. Bennett said: "Unless the rules or statute requires it, I don't think so" (Transcript,

493). And then, after the jury were still out considering their verdict, Mr. McFarland, attorney for appellant, made some very general exceptions to the charge of the Court, without any specification of error (Transcript, 493, 494), which are of the most general character of exceptions, and which are entirely insufficient to raise any question for the consideration of this Court, and further, such general exceptions were made too late, after the jury had been instructed and retired to consider their verdict (Transcript, 494). And after the jury had so retired the Court granted appellant permission to embody in its bill of exceptions further objections to the instructions to the jury not then mentioned.

Nothing further was done toward taking exceptions to the instructions to the jury until November 22, 1912, when an order was entered giving the appellant ten days after November 26, 1912, in which to prepare and file its bill of exceptions (Transcript, 624). December 6, 1912, the bill of exceptions was presented to the Court, and on January 6, 1913, it was approved and signed by the Judge and filed (Transcript, 625).

At the bottom of page 616 of the Transcript, we find these words: "The defendant, in accordance with the permission of the Court heretofore granted it so to do, as before stated in this bill of exceptions, now upon the tendering of this bill of exceptions states more fully and in detail the objections to said instructions as follows." It will be noticed that appellant tendered its bill of exceptions on December 6, 1912, and then for the first time presented its ob-

jections to the instructions of the Court, which we find on pages 617-624 of the Transcript, and on said page 624, first paragraph from the top of page, we find this wording: "And time was given, as hereinbefore stated, within which the defendant could prepare and file its bill of exceptions to said rulings."

Now, the record stands in this shape: appellant did not take any exceptions to the Court's instructions to the jury, nor any exceptions to the ruling of the Court in its refusal to give certain of defendant's instructions, until after the jury had retired to consider of their verdict, and then only those general exceptions were taken which we find on pages 493, 494 of the Transcript, and the jury was not recalled, and there was no further exceptions to the instructions, nor to the refusal of the Court to give appellant's requested instructions, until the tender of the bill of exceptions, on December 6, 1912.

Exceptions to a charge, given or refused, must be taken before the jury retire, and the bill of exceptions must show that fact, and if the bill of exceptions does not so show, the Court on appeal has no jurisdiction to consider the alleged error.

Star Co. vs. Madden, 188 Fed. (C. C. A.) 910.

Klaw vs. Life Pub. Co., 145 Fed. (C. C. A.) 185.

Simpkins' Federal Suit at Law, page 113.

We join in the remark of Judge Van Devanter in the case of Chicago, Great Western Ry. Co. vs. M'Donough, 161 Fed. (C. C. A.) 659:

"The practice of filing such a large number of assignments cannot be approved. It thwarts the

purpose sought to be subserved by the rule requiring any assignments. It points to nothing. It leaves the opposing counsel and the Court as much in the dark concerning what is relied on as if no assignments were filed."

Those general exceptions to the instructions to the jury were insufficient to present a question for the consideration of this Court, if the same had been taken before the jury had retired to consider of their verdict.

American Smelting & Refining Co. vs. Karapa,
173 Fed. (C. C. A.) 608.

Penn. Co. vs. Whitney, 169 Fed. (C. C. A.) 577.
Simpkins' Federal Suit at Law, page 114.

It would appear that we ought not inquire further about the exceptions to the Court's charge to the jury. However, we will take each one up.

Appellant, under Assignment of Error IX (Transcript, 640, 641), claims error in charge to the jury on assumption of risk. The first part thereof, beginning with the word "But," continuing on page 641, and closing with the words "not so engaged," was copied from Richardson vs. Klamath S. S. Co., 126 Pac. (Ore.), 26, 2d column, par. (3); same rule applied in Westine vs. Atchison T. & S. F. Ry. Co., 114 Pac. (Kan.) 219, 222; same rule announced by Judge Hunt in Williams vs. Bunker Hill & Sullivan Min. Co., 200 Fed. 211, 216.

That portion of the instruction (Transcript, 608) beginning with the word "Now," and closing with the words "have produced the injury," is a copy of

the Court's charge in *Northern Pac. Ry. Co. vs. Maerkl*, 198 Fed. 1, and there had the consideration of this Court. In the *Maerkl* Transcript, page 151, this instruction appears, and in that case the defendant in error, in his brief, page 39, says:

“The statement that the unknown risk was not assumed is but the converse of the statement, that the employer was guilty of actionable negligence, and the authorities which we have cited under that point are applicable here.”

The same doctrine is announced by this Court in *Sandidge vs. Atchison T. & S. F. Ry. Co.*, 193 Fed. 878.

The remaining portion of that instruction, under appellant's Assignment of Error IX, page 641 of the Transcript herein, in which the Court told the jury “that the plaintiff did not assume the risk of any danger which arose in whole or in part from the negligence of any officer, agent or employee of the defendant,” was a correct statement of the law.

Wright vs. Yazoo & M. R. Co., 197 Fed. 94, 97.

Northern Pac. Ry. Co. vs. Maerkl, 198 Fed. 6.

Sandidge vs. Atchison T. S. & F. Ry. Co., 193 Fed. 878.

Choctaw O. & G. R. Co. vs. McDade, 191 U. S. 67, 48 L. Ed. 100.

The appellant, under its Assignment of Error X (Transcript, page 641, claims error, in that the Court instructed the jury, “If the plaintiff is guilty of contributory negligence, and his negligence and that of the defendant company be equal, the jury will then

give an award of one-half of the damages it would have given if he had been free from negligence; but if he be twice as negligent as the defendant company, then a third will be the proportion of damages he will receive, and so on, whatever the proportion may be."

We see no error in this instruction. Under section 3 of the Federal Employers' Liability Act, 1908, such instruction should be given the jury. In the case of *Northern Pac. Ry. Co. vs. Maerkl*, 198 Fed. 1, the same instruction was given the jury. See Transcript *Maerkl Case*, pages 144, 145, where it will be found.

Thornton on Federal Employers' Liability Act (2d ed.), sec. 86, page 140, says such instruction should be given to the jury.

The appellant, under its Assignment of Error XI, claims the Court erred in instructing the jury on the doctrine of contributory negligence because it used this language: "That is, subject to the qualification that if the contributory negligence or the negligence of the plaintiff was so willful and of such a character as that the jury might say that it was the direct and proximate cause of the injury, then the plaintiff could not recover by reason of such negligence. The distinction between the two cases being that the negligence of the plaintiff in the one case, instead of being a contributing cause, was so gross, so willful and extended to such an extent as that the jury may say that it was the direct and proximate cause of the injury."

The effect of this instruction was to inform the jury that if the plaintiff was injured by reason of his

own negligence, he could not recover. It would not make any difference, under the Employers' Liability Act, whether plaintiff's negligence was willful or gross, or by whatever name we may designate it, if his negligence in any form was such that the jury could say from the evidence that it was the proximate cause, the plaintiff could not recover.

The Federal statute does not recognize degrees of negligence, but prevents the plaintiff from recovering when his negligence, whatsoever the form thereof may be, becomes the approximate cause of the injury.

Thornton on Federal Employers' Liability Act,
2d ed., sec. 89, p. 143.

This instruction did not mislead the jury as to the law of the case, and was but an explanation of a preceding instruction, and was intended to inform the jury that plaintiff could not recover if his negligence was of such a character that the jury could say that it was the proximate cause of the injury.

We ought to view the instructions as a whole, and if upon the main they are correct, there is no error.

The Court very fully covered all features of the case in its instructions. Beginning on page 603 of the Transcript, the Court defined the issues. On page 605, informed the jury that the negligence must be proven and established as the basis of any recovery in this case, and there very clearly defined the term "negligence," and informed the jury whether negligence existed was a question for the jury. On page 607, informed the jury that it must be shown that defendant's negligence was the proximate cause of

the injury. On page 609, the Court told the jury, using this language, "Now, if you find that the defendant was guilty of negligence in the particulars mentioned which directly contributed to the collision in which the plaintiff was injured, then you will consider the further question whether or not the plaintiff was guilty of contributory negligence. By contributory negligence is meant that the plaintiff himself in and about the occurrence was guilty of lack of ordinary care—in other words, guilty of negligence—and that plaintiff's negligence contributed to the production of the injury so that without it the injury would not have occurred. If you find that a state of affairs existed so that but for the negligence of the plaintiff the accident would not have occurred, you will find that he was guilty of contributory negligence." Then follows the excerpt of which appellant complains. But the appellant did not include in his excerpt any portions of the following instruction. After which the Court told the jury: "If you so find, it will be your duty to ascertain in what degree the negligence of the two parties contributed to bring about the result, and you will then diminish the amount of the recovery," etc. Then, just following page 610, the Court told the jury, "Now, the burden is upon the plaintiff to prove that the defendant was guilty of negligence, and that negligence caused the injury." And on the same page instructed the jury that the plaintiff must make out its burden of proof. On page 613 of Transcript, told the jury if the defendant was not guilty of negligence, that they should find for the defend-

ant. On page 614 of the Transcript the Court charged the jury: "The burden of proof is upon the plaintiff to establish by a preponderance of the evidence that the defendant company was guilty of negligence, and that such negligence was the proximate or immediate cause of the injury complained of; and unless the plaintiff has established by a preponderance of the evidence in this case that the defendant was guilty of negligence, your verdict must be for the defendant."

There was no evidence in the case which showed that the respondent was guilty of any negligence, or that his negligence in any way contributed to bring about the injury. As far as the facts are concerned, the charge on contributory negligence could well have been left out of the case. The jury were told a number of times in the charge of the Court that the plaintiff must prove by a fair preponderance of the evidence that the defendant was guilty of negligence, and such negligence was the proximate cause of plaintiff's injuries. There can be no question that the jury were correctly informed on the law, of the issues and of their duty. The instructions were more favorable to appellant than the facts warranted.

If the appellant was guilty of any negligence producing the injuries the respondent should recover.

Grand Trunk Western Ry. Co. vs. Lindsay, 201 Fed. (C. C. A.) 841 (pamphlet).

Louisville & N. R. Co. vs. Wene, 202 Fed. (C. C. A.) 887, 891, (in pamphlet).

The appellant, under its Assignment of Error XII

(Transcript, page 642), contends that the Court misdirected the jury in its charge. The excerpt taken is but a fragment of the instruction, and when the whole instruction is taken into consideration, it will be found correct. The full charge complained of is set out in the Transcript, page 613, in which the Court told the jury:

“I charge you further that even if the defendant left the cars under the circumstances detailed in this case on the main line with the brakes un-set, and if the cars by reason of gravity did move to and upon the switch to the point of collision, yet if the plaintiff was warned of the danger and was given a signal which required him to immediately stop his engine, and if he had promptly obeyed such danger signal, he could with the means at his disposal have stopped his engine and thus avoided the collision, and he then willfully or purposely did not do so, then the negligence of the defendant, if any, is not the proximate cause of the injury, and the plaintiff cannot recover.”

Under the law already cited, it is plain that this instruction is as favorable as the appellant could ask, for if it was negligent, it was liable, and if the respondent was injured through his own negligence and carelessness, he could not recover; but if the respondent was injured through the joint negligence of himself and the appellant, yet he is entitled to recover.

The appellant, under its Assignment of Error XIII (Transcript, 642), claims the Court erred in

holding the offered testimony of Dr. H. H. Starck privileged, and excluding it on that ground.

The Revised Statutes of Arizona of 1901, section 2535, provides that "The following persons cannot be witness in a civil action." And subdivision 6 of that section is as follows:

"A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient: Provided, That if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

This statute is perhaps broader than most statutes on that question, and under its provisions the Court held the offered testimony of Dr. Starck privileged, and refused to permit Dr. Starck to testify. There was testimony before the Court which showed that the relation of physician and patient did exist under the law. There was some conflict in the testimony whether or not the relation of physician and patient did exist. From the plaintiff's testimony it fully appears that the relation did exist, and this presented a question for the lower court to pass upon. The trial court must pass upon such question in the first instance, and if there is any evidence at all to sustain the ruling of the lower court, the appellate court will not disturb the ruling. The lower court

had the right to believe Dr. Starck or believe Mr. Clark, and because the trial court believed Mr. Clark, and found that the relation of physician and patient did exist, although the testimony was conflicting on that point, does not afford any ground for complaint on that ruling in this Court. It was discretionary with the trial court as to whose version of the matter it would believe, and that discretion will not be disturbed on appeal, unless it clearly appears that the lower court abused its discretion.

We will take a few excerpts of the testimony on this question.

Testimony of Dr. STARCK (Transcript, 644):

“Q. At whose instance did you see him?

A. Mr. A. T. Thompson.

Q. Mr. Thompson was at that time connected with the defendant railway company?

A. Yes, sir. I don't know what his position was at that time—he was the head of it.

Q. Where did you see Mr. Clark?

A. At Clifton.

Q. Where in Clifton?

A. At the A. C. Hospital.

Cross-examination (Transcript, 645):

Q. At the hospital of the defendant company in Clifton? A. Yes, sir.

(Transcript, 646:)

Q. In other words, no other doctor was present?

A. Dr. Dietrich might have come in.

(Transcript, 647:)

Q. Did you tell him you were a doctor?

A. Yes, I believe I did tell him—most of the in-

troduction was done on my part. I told him I was up there to examine him and he consented to it.

Q. Did you tell him anything about any special employment for the company?

A. I don't remember whether I did or not.

(Transcript, 648:)

Q. So your only knowledge was derived at that interview? A. As to the condition of his eye?

Q. Yes? A. Yes, sir.

(Transcript, 649:)

Q. So you can say that all the subject symptoms that you discovered to exist in his case were derived from him on that occasion?

A. Yes, sir; that is right.

A. T. THOMPSON (Transcript, 649):

Q. Do you know whether Mr. Clark knew that Dr. Starck was not one of the regular employed physicians of the defendant?

A. I don't know what he knew.

Q. Isn't it a fact that you compensated him out of the funds of the defendant? A. Yes, sir.

(Transcript, 650:)

Q. Isn't it a fact that the defendant maintains a so-called medical department or hospital?

A. Yes, sir; it did at that time.

A. It included every medical attention—every care in the hospital in case of injury.

Q. Every medical attention and all the facilities of the hospital. A. Yes, sir.

Q. That includes, of course, the diagnosis of a man's injuries at the company's hospital?

A. Oh, yes.

THOMAS P. CLARK (Transcript, 655):

Q. Tell us what the hospital was where you were examined. A. They call it the A. C. Hospital.

Q. Is that, or is it not, the hospital in which the injured employees of the defendant are examined?

A. Yes, sir.

Q. Who was it that requested you to be examined, if anyone, by Dr. Starek?

A. I think it was Dr. Dietrich.

Q. You think Dr. Dietrich suggested it?

A. Yes, sir. He told me when he would be there.

Q. Was anything said to you in reference to the purpose for which the examination was requested or required? A. To examine my eye.

Q. Dr. Dietrich was then in attendance upon you as your physician?

A. I was still under his charge.

(Transcript, 656:)

Q. You don't know for whose benefit it was to be made? A. For my benefit, I suppose.

Q. Did you or did you not believe that Dr. Starek was in consultation with Dr. Dietrich, your attending physician? A. Yes, sir.

(Transcript, 657:)

(Examination of witness by the Court:)

The WITNESS.—I told Dr. Dietrich about it and he tried to examine it himself, and then he made the date with Dr. Starek a few days afterwards.

(Transcript, 658:)

(Examination by the Court:)

Q. What did you understand was the object of

this examination of your eye?

A. To know whether it was injured or not.

Q. What difference did it make whether it was injured or not in your judgment?

A. It would make a whole lot. (Transcript, 659.)

Q. In what way?

A. From good sight to blindness—I wanted that information.

Q. Who wanted it? A. I did. (Transcript, 659.)

Q. You wanted it?

A. I wanted to know the condition of it. When I reported to Dr. Dietrich, he said they had no oculist and that they would get one, and then I left the thing to Dr. Dietrich, and when they made the appointment, I appeared.

(Transcript, 659, bottom page:)

Q. You knew that he came from El Paso?

A. I heard that.

Q. You heard that before?

A. I heard it at the examination. Dr. Dietrich said he would have their man."

It is plain from this evidence that it was the duty of appellant company to employ physicians to treat its injured servants, and that Dr. Starck was so employed, and that Dr. Dietrich, Clark's attending physician, informed Clark that appellant would get an oculist, call in their man, to examine his eyes, and that Dr. Dietrich made the arrangement and informed Clark that their man was there to examine his eyes, and that Clark believed the examination was for the purpose of treating his eyes, and was

to be made for his benefit.

From a knowledge of the duty of appellant to furnish physicians to treat its injured employees, the action of the company, the promises and conduct of Dr. Dietrich, Clark was led to believe that the examination was for his benefit. The evidence shows that the company and Dr. Dietrich failed to inform Clark of the true mission of Dr. Starck. He was given no information that the examination was desired by the company for the purpose of evidence in this lawsuit, but, on the contrary, the company led Clark to believe that the examination was for his benefit.

It clearly enough appears that the company and Dr. Dietrich resorted to tricks and deception for the purpose of obtaining evidence for a lawsuit, and make Clark believe that the true object was for his benefit, and for the purpose of treating his eye if anything could be done for it. As Clark stated, that it made all the difference to him—"From good sight to blindness, I wanted that information. I wanted to know the condition of it."

We think it well settled that evidence so obtained cannot be used.

"A physician sent by an officer of a defendant corporation in a personal injury case to examine the plaintiff, although for the purpose of obtaining evidence, and the patient believes that the doctor was called for the purpose of treating him and submits to an examination under such belief, the knowledge and information so obtained is privileged."

Munz vs. Salt Lake City Ry. Co., 70 Pac. (Utah) 852.

1 Elliott on Evidence, p. 741, sec. 634.

Underhill on Criminal Evidence, 2d ed., sec. 179.

The leading case on the question of privileged communication, and which holds that if such information be obtained by trick, deception, misrepresentation, or by any other means, whereby the patient is made to believe that the examination is to be made for his benefit, the information so obtained is privileged.

The People vs. Ira Stout, Parker's Criminal Reports (N. Y.), vol. 3, pp. 670, 675; this case was reaffirmed in People vs. Austin, 93 N. E. (N. Y.) 59.

"A physician sent to a prisoner, who accepts his services professionally, and the disclosures so made are privileged."

People vs. Murphy, 4 N. E. (N. Y.) 326.

"A physician called in by an attending physician, or by friends, or by strangers, and who makes an examination of the patient, or learns from the patient the nature of his injuries, such knowledge and information are privileged, and the physician cannot give testimony of the same."

Reinhan vs. Dennin, 9 N. E. (N. Y.) 320, 322.

Union Pac. R. Co. vs. Thomas, 152 Fed. 365.

"If a physician attends a person under circumstances calculated to produce the impression that he does so professionally, and his visit is so regarded and acted upon by the person, it is enough to establish the relation."

"These statutes are designed to protect the

patient, not the physician, and, being remedial in their nature, ought to receive a liberal construction which will fully effectuate their wise and humane provisions.”

Underhill on Criminal Evidence, 2d ed., sec. 179,
p. 341.

Freel vs. Market Street Cable Ry. Co., 97 Cal.
40.

23 Ency. Law (2d ed.), pp. 84, 85.

“The refusal to permit a physician called as an expert to testify in a negligent action is not ground for reversal, where the record does not show what testimony the witness was expected to give, or that he was qualified to give any.”

Henrencia vs. Guzman, 219 U. S. 44, 55 L. Ed.
81.

Appellant, under its Assignment of Error XIV (Transcript, 660), claims that the Court erred in failing to give appellant's instruction set out on pages 660, 661. The Court had fully instructed the jury on all facts of the case, and this instruction is not the law of the case, and if given would have absolved the defendant from liability on account of its negligence, and prevented a recovery if the plaintiff was in anywise negligent, although defendant was guilty of bringing about a state of affairs which materially produced the injury. In that instruction the appellant asked the Court to instruct the jury:

“If it appears that the plaintiff could have stopped and so avoided the collision from which his alleged injuries resulted, and that he failed

to do so, the proximate cause of the injury was his own negligence, and he cannot recover in this case.”

“If you believe that the movement of the four cars in question could not, under all the circumstances, have been reasonably prevented, defendant is not liable.”

And on page 661, Transcript, the objectionable portions of the charge are:

“Yet if plaintiff was warned of danger, or was given a signal which required him to immediately stop his engine within time had he promptly obeyed the signal to have stopped, and thus avoided the collision, and he negligently or purposely did not do so, then the negligence of the defendant, if any, is not the proximate cause of the alleged injury, and the plaintiff cannot recover.”

Of course the statute is, that the defendant is liable for an injury resulting in whole or in part from the negligence of any of its employees. Defendant's requested instructions eliminated that feature of the law.

Next, appellant wished to have the Court tell the jury: If the movement of the cars “was being performed in the manner usually adopted in well-managed and operated railroads and generally recognized as good railroading,” then the defendant was not liable.

Well-managed and operated railroads had nothing to do with the question. All railroads at times are guilty of negligence, and the question at bar was,

in that particular instance, Was the defendant guilty of negligence? The instruction was misleading.

The latter part of that instruction, pertaining to assumption of risk, was well covered in the charge of the Court, and further, it is faulty in eliminating the negligence of defendant in the methods of operating its cars.

Appellant claims error under its Assignment XV (Transcript, 662), and says the Court erred in instructing the jury, "That in order to relieve the defendant from liability on account of negligence, the negligent conduct of the plaintiff must be willful and wanton."

There was no such instruction given, which is a sufficient answer to this assignment of error.

Appellant, under its Assignment of Error XVI, claims that the damages assessed by the jury are excessive.

The question of excessive damages is for the trial court.

Texas & Pacific Ry. Co. vs. Behymer, 189 U. S. 469, 47 L. Ed. 905.

Southern Ry. Co. vs. Craig, 113 Fed. 79.

Western Gas Const. Co. vs. Danner, 97 Fed. (C. C. A. 9th Circ.) 883, 890.

In appellant's Assignment of Error XVII (Transcript, 662), it is claimed that the evidence is insufficient to justify the verdict of the jury. That question is not open for review in this court, because the assignment of error does not show in what particular. No evidence is set out, and the question was not raised in the lower court. Appellant did not,

at the close of all the evidence, move for an instructed verdict on any ground.

Appellant's Assignment of Error XVIII claims that the verdict is against the law. The assignment is too general to be considered. The error, whatever it might be, is not specified.

Appellant, under its Assignment of Error XIX (Transcript, 662), claims error, because on objection the Court excluded the deposition of Dr. Dietrich. This deposition was taken pursuant to a stipulation under the laws of the State of Arizona. The stipulation appears in the Transcript, 663, which especially reserves the right to object to the evidence, to wit: *"That the said deposition of said witness when so taken and returned may be read in evidence in this cause subject to the same objections and exceptions as if said witness were personally present on the stand."*

Section 2525 of the Revised Statutes of Arizona of 1901 is applicable here, which is as follows:

"2525. Depositions may be read in evidence upon the trial of any suit in which they are taken, subject to all legal exceptions to which might be made to the interrogatories and answers were the witness personally present before the Court giving evidence."

This deposition, or so-called deposition, is not in the bill of exceptions. It is not made a part of the bill of exceptions; it is not before Court for consideration. Before the Court could consider this deposition it must be in the bill of exceptions.

United States vs. Copper Queen Consolidated Mining Co., 185 U. S. 495, 498, 46 L. Ed. 1009.

The bill of exceptions must contain all the evidence sought to have reviewed.

Alaska Commercial Co. vs. Dinkelspiel, 126 Fed. (C. C. A. 9th Cir.) 164.

Boatmen's Bank vs. Trower Bros. Co., 181 Fed. (C. C. A.) 809.

Star Co. vs. Madden, 188 Fed. (C. C. A.) 910.

Even if respondent did submit some cross-interrogatories in the deposition of Dr. Dietrich, such, under said stipulation and laws of Arizona, would not preclude an objection on the ground of incompetency.

The Arizona statute on the feature of depositions was taken from Texas, and it is the rule there under the same statute that the deposition may always be objected to when offered in evidence on the ground of incompetency, and such appears to be the general rule in other States.

9 Ency. Law (2d ed.), 363, note 5.

6 Ency. Pl. & Pr. 596, n. 2.

Some statutes provide if a party appears personally and asks questions, without objecting to incompetency, that he thereby waives that right when the deposition is offered in evidence, but such is not the Arizona statute. The right to object on the ground of incompetency may always be taken advantage of when the deposition is offered in evidence. In the Dr. Dietrich deposition the respondent did not, nor

did anyone for him, appear and cross-examine that witness.

“The competency of a witness to testify can only be determined when his deposition is offered upon the trial, at which time the deposition stands for the witness.”

Messimer vs. McCrary, 21 S. W. (Mo.) 17.

Incompetent testimony goes out on the trial under an objection on that ground (Griffith vs. McCandles, 59 Pac. [Kan.] 729), although the party objecting appeared and cross-examined the witness.

Rogers vs. Tompkins, 87 S. W. (Tex.) 383.

Attending physician's deposition is incompetent.

Epstein vs. Penn. R. Co., 122 S. W. (Tenn.) 370.

Ill. Cent. R. Co. vs. Panebiango, 81 N. E. (Ill.) 53.

Appellant assigns as Error XX (Transcript, 675), the refusal of the Court to grant a new trial. That matter is entirely discretionary.

Simpkins' Suit at Law, 126.

Manning vs. German Ins., 107 Fed. 52.

Respectfully submitted,

L. KEARNEY,

W. M. SEABURY,

Attorneys for Defendant in Error.

TITLE OF CASES CITED.

2

	Page
<i>Allen vs. Cooley</i> , 31 S. W. 630	16
<i>Anthony vs. Masters</i> , 62 N. E. 505.....	18
<i>Bank vs. Bolong</i> , 40 S. W. 411.....	21
<i>Bank vs. Ill. Cent. Ry. Co.</i> , 196 Fed. 171	21
<i>Bethlehem Iron Co. vs. Miss.</i> , 100 Fed. 45.....	12
<i>Bohn Mfg. Co. vs. Erickson</i> , 55 Fed. 943	11
<i>Brown vs. Rome W. & O. Ry. Co.</i> , 45 Hume 239 (N. Y.)	43
<i>Cain vs. S. P. Ry. Co.</i> , 199 Fed. 211 (Adv. Sheets Fed. Rep. Nov. 29, 1912).....	48
<i>Callahan vs. Broderick</i> , 56 Pac. 782.....	17
<i>Carlile vs. People</i> , 59 Pac. 48.....	17
<i>Carnegie vs. Penn. Ry. Co.</i> , 113 Penn. St. 174..	31
<i>C. B. & Q. Ry. Co. vs. Shalstrom</i> , 195 Ned. 725	34
<i>Chesapeake & O. R. Co. vs. Hennessey</i> , 96 Fed. 713	9
<i>C. I. & G. R. Co. vs. Gorman</i> , 941 N. E. 730....	45
<i>Chicago St. L. & P. Ry. Co. vs. Bills</i> , 3 N. E. 613	24
<i>Choctaw O. & G. R. Co. vs. Holloway</i> , 114 Fed 458.....	8-33
<i>City of Buffalo vs. Holloway</i> , 7 N. Y. 492.....	18
<i>City of Logansport vs. Klihm</i> , 64 N.E. 595.....	18
<i>Daughtery on Liability of Employers' under Fed. Liability Act</i>	46
<i>Dell vs. Phillip Glass Co.</i> , 32 Atl. 601-2.....	35
<i>Devilico vs. Ry. Co.</i> 20 Atl. 953.....	19
<i>Dixon vs. W. U. Tel. Co.</i> , 68 Fed. 630.....	10-12
<i>Dubois vs. Int. Paper Co.</i> , 196 Fed. 37.....	47
<i>Erie Ry. Co. vs. U. S.</i> , 195 Fed. 287.....	23
<i>Fogg vs. Nev. Ry. Co.</i> , 23 Pac. 840.....	17
<i>Fox vs. Rogers</i> , 59 Pac. 538.....	20
<i>Frasier vs. Penn. Ry. Co.</i> , 38 Penn. St. 104....	31

TITLE OF CASES CITED—Continued.

	Page
<i>Florence Oil & Refining Co. vs. Farir</i> , 109 <i>Fed.</i> 254.....	16
<i>Fritz vs. W. U Tel. Co.</i> , 71 <i>Pac.</i> 209	35
<i>Gallegos vs. Standoval</i> , 106 <i>Pac.</i> 373.....	24
<i>Glavin vs. Boston & M. Ry.</i> , 100 <i>N. E.</i> 617 (<i>Ad- vance Sheet Feb. 15, 1913</i>).....	12-13
<i>Gould vs. Railway Co.</i> , 1st <i>Otto</i> 426-516.....	17
<i>Grand Val. Irr. Co. vs. Leshner et al</i> , 65 <i>Pac.</i> 44	17
<i>Green vs. Hereford</i> , 12 <i>Arizona</i> 85.....	19
<i>Griffith vs. Wright</i> , 58 <i>Pac.</i> 582.....	17
<i>Heberlaw vs. Lake S. & M. S. Ry.</i> , 73 <i>Ill. App.</i> 261.....	20
<i>Henry vs. Cleveland C. C. & St. L. R. Co. (U. S.)</i> 67 <i>Fed.</i> 426.....	35
<i>Herrington vs. Winn</i> , (60 <i>Hun.</i> 235) <i>N. Y.</i> <i>Sup.</i> 612.....	45
<i>Hieronymous vs. N. Y. Nat. Bldg. & Loan Assn.</i> , 101 <i>Fed.</i> 12.....	17
<i>History Co. vs. Dougherty</i> , 3 <i>Arizona</i> 387.....	18
<i>Kenney vs. Turner</i> , 15 <i>Ill.</i> 182.....	16
<i>Kilpatric vs. City of Dallas</i> , 115 <i>Pac.</i> 424.....	16
<i>In Re Dunn</i> , 181 <i>Fed.</i> 701.....	16
<i>James vs. City Investing Co.</i> , 188 <i>Fed.</i> 513.....	14
<i>Johnson vs. International & C. N. R. Co.</i> , 57 <i>S. W.</i> 869.....	35
<i>Lake Erie & W. R. Co. vs. Wilson</i> , 59 <i>N. E.</i> 573.....	12
<i>Lakeshore & N. S. Ry. Co. vs. Stupak</i> , 23 <i>N.</i> <i>E.</i> 246.....	31
<i>Laport vs. Cook</i> , 38 <i>Atl.</i> 700.....	20
<i>Leitham vs. Cusick</i> , 1st <i>Utah</i> 224	16
<i>Leiter vs. Jackson</i> , 35 <i>N. E.</i> 289.....	18
<i>Mallory vs. Globe Boston C. M. Co.</i> , 11 <i>Ariz.</i>	

TITLE OF CASES CITED—Continued.

	Page
296	16
<i>Massenbacker vs. L. & M. S. Ry. Co.</i> 42 Atl.	
67.....	20
<i>McAndrews vs. Chicago L. & S. Ry. Co.</i> , 78 N.	
<i>E.</i> 603.....	7
<i>McKay vs. Campbell</i> , 1 Sawyer 374.....	20
<i>McMahon vs. Can. Pac. Ry. Co.</i> , 66 Pac. 708...	24
<i>Minty vs. U. P. Ry. Co.</i> , 21 Pac. 660.....	11
<i>Merrill vs. Derring</i> , 22 Minn. 376 (cited twice)	20
<i>metropolitan Life Ins. Co. vs. Hartman</i> , 174	
<i>Fed.</i> 801	24
<i>Mobile Savings Bank vs. Board</i> , 22 Fed. 580 14-16-18	
<i>Mondu vs. N. Y. N. H. & H. R. Co.</i> , 223 U.	
<i>S.</i> 1.....	35
<i>Myers vs. Standard L. S. & Ins. Co.</i> (8th App.	
<i>Div.</i> 74) 40 N. Y. Sup. p 419	45
<i>Narramore vs. Cleveland C. C. & St. L. R. Co.</i>	
96 Fed 298.....	9
<i>Neil vs. Idaho & W. N. R. Ry.</i> , 125 Pac. 331..	9
<i>Nothloff vs. L. A. Gas Co.</i> , 118 Pac. 436.....	34
<i>People vs. Austin</i> , 93 N. E. 57.....	43
<i>People vs. Cobb</i> , 51 Pac. 523.....	17
<i>Pomeroy's Code Rem.</i> (4th Ed.) Sec. 47, 553.....	24
<i>Pomeroy's Code Rem.</i> (1904) Sec. 446, p 611.....	19
<i>Peterson vs. New Pittsburg Coal & Coke Co.</i> ,	
49 N. E. 8	12
<i>Picotte vs. Watt</i> , 31 Pac. 805.....	17
<i>Ramsdell vs. Clark</i> , 49 Pac. 591.....	20
<i>Rev. Statutes of Arizona</i> , 1901, No. 1356.....	15
<i>Rutherford vs. Foster</i> , 125 Fed. 187	17
<i>Rutledge vs. N. Pac. Ry. Co.</i> , 19 S. W. 38.....	19
<i>Salem Bedford Stone Co. vs. Hodds</i> , 42 N. E.	
1022	12

TITLE OF CASES CITED—Continued.

	Page
<i>Schlemmer vs. Buffalo R. & Ry. Co.</i> , 220 U. S. 590.....	9
<i>School District No. 2 vs. Shuck</i> , 113 Pac. 511...	16
<i>Seymour vs. Franklin</i> , 92 Fed. 122	24
<i>Southern Electric Ry. Co. vs. Hageuan</i> , 121 Fed. 262.....	17
<i>Southern Kans. Ry. Co. vs. Griffith</i> , 38 Pac. 478	24
<i>S. P. Ry. Co. vs. Campbell</i> , 189 Fed. 182	16
<i>Standard Cement Co. vs. Minor</i> , 100 N. E. 767 (Adv. Sheets Mar. 11, 1913).....	11
<i>St. Louis Cordage Co. vs. Miller</i> , 126 Fed. 495..	9
<i>Stratton's Independence Ltd. vs. Sterrett</i> , 117 Pac. 351..	16
<i>Tel. Co vs Patterson</i> , 1 Nev. 150.....	16
<i>Thompson vs Cit. St. R. Co.</i> , 53 N. E. 46, 117 Pac. 361.....	24
<i>Thompson vs Chicago M. & St. P. Ry. Co.</i> 18 Fed 239.....	10
<i>Thompson vs K.M Livery Co.</i> , 113 S. W. 1128..	21
<i>Thorsen vs Babcock</i> , 36 N. W. 723.....	21
<i>Thornton Fed. Employers' Liability</i> [1912 Ed] Sec. 88	34
<i>Toledo & N Ry. Co. vs Daniels</i> , 21 Ind. 256.....	20
<i>Union Cas. Sur. Co vs. Bragg</i> , 65 Pac. 272.....	24
<i>U. P. Ry Co. vs Wiler</i> , 158 U. S. 285.....	20, 24
<i>Vindicator Cons. Gold Mining Co. vs First-</i> <i>brook</i> , 86 Pac. 313	19
<i>Willard vs Corrigan</i> , 8 Ariz. 70.....	19
<i>Webber vs Dillon</i> , 54 Pac. 894	17
<i>White vs U. S</i> [Advance Sheets Fed April 3, 1913] 202 Fed 501.....	49
<i>Yazoo R. Y. Co. vs Wallace</i> , 43 S. W. 369.....	21

No. 2259

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE ARIZONA AND
NEW MEXICO RAIL-
WAY COMPANY,

Plaintiff in Error,

vs.

THOMAS P. CLARK,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This action was commenced by the defendant in error in the District Court of the Territory of Arizona on the 18th day of January, 1912, for damages alleged to have resulted from an accident on the 15th day of March, 1911. On the day of, 1912, this cause was transferred from the Territorial Court to the United States Court for the District of Arizona, on motion of defendant in error, under Section 62 of the Judicial Code (1911.)

At the date of the accident, and for several years prior thereto, the defendant in error was in the employ of plaintiff in error as Locomotive Engineer in charge

of its Switch Engine and on said date defendant in error was engaged in switching freight cars within the yard limits of the plaintiff in error in the town of Clifton. Twelve of these cars on the date of the accident were moved from one point to another within the yard limits, and left standing at the latter point, for the purpose of being switched to the Shannon Smelter on and over what is known as the Shannon Spur. The point at which the cars were left standing was on the main line south of the intersection of the Shannon Spur. The track at the point of intersection with the Shannon Spur and south on the main line is practically level; the grade from the Shannon Spur south for 846 feet, being sixteen one hundredths of one per cent (.16 per cent.) Defendant in error on the date of the accident assisted by the switching crew coupled his engine on to four of the cars left standing on the main line and switched them up to the Shannon Smelter over the Shannon Spur; returning from the Shannon Smelter he coupled his engine on to four of the eight cars left standing and pulled them north on the main line beyond the intersection of the Shannon Switch. In the meantime the four cars left on the main line without any known cause started to roll very slowly north and as defendant in error was backing up south over the main line at the rate of about six miles an hour, the four cars in front of his engine having passed on to the Shannon Spur, the cars left on the main line collided with his engine just as it was passing from the main line on to the Shannon Spur.

The method of plaintiff in error in its switching operations at this point for the past thirteen years had uniformly been to leave cars on the main line without the brakes being set, which method was known to defendant in error. Covering this period cars left standing on the main line had moved possibly once a few feet and stopped. No accident or injury had ever occurred by reason of this method of operation. Defendant in error had been in the employ of plaintiff in error as Locomotive Engineer for about thirteen

years; had charge of its switch engine daily for several years prior to this accident; was familiar with the method of operation in switching at this point; never complained of the manner or method of operation. The method was open and obvious and known and appreciated by him; in fact he admits in his testimony that he knew this uniform method of operation. Rec. p. ~~107-108 folio~~.....)

Defendant in error after the transfer to the Federal Court filed an amended complaint setting forth practically the same facts alleged in his original complaint. On the.....day of he filed a second amended complaint in which he alleged substantially the same facts set forth in his original and amended complaints. To the second amended complaint plaintiff in error filed an amended answer in which it interposed general and special demurrers; general denial; assumption of the risk; contributory negligence. The questions involved are as follows:

- 1st. The sufficiency of the complaint raised by a general demurrer (Rec. page ~~62-85~~.....folio) and by motion for directed verdict. (Rec. page. ~~108~~..... folio)
- 2nd. The sufficiency of certain parts of the complaint raised by special demurrer (Rec. page. ~~70-71-85~~.....folio.....).
- 3rd. The indefiniteness and uncertainty of said complaint and each count thereof by a motion to make more definite and certain (Rec. page. ~~60-85~~... folio.....)
- 4th. On the ground of duplicity by motion to strike plaintiff's second amended complaint from the files because each count thereof is duplicitious (Rec. page. ~~64-67~~...folio ..~~85~~.....)
- 5th. The insufficiency of plaintiff's second amended

complaint was also raised by defendant's objection at the beginning of the trial to any evidence in the case on the ground that said amended complaint and neither count thereof alleged facts sufficient to constitute a cause of action. (Rec. page 108.-109...., folio 85. 112.-113....)

6th. The question of variance was raised by defendant at the close of plaintiff's evidence by a motion for a directed verdict. The facts alleged in the first and second counts of plaintiff's amended complaint are based upon the first section of the "Employers' Liability Act," approved April 22, 1908, in respect to injuries received by employees while engaged in interstate commerce, and the evidence at the close of plaintiff's case failed to show that defendant and plaintiff were engaged in interstate commerce at the date of the alleged injuries. The undisputed evidence in the case showing that plaintiff and defendant were engaged at the date of the alleged accident in switching cars in defendant's local yards at Clifton. It was conceded by plaintiff and the court that plaintiff and defendant were not engaged in interstate commerce at the date of the alleged injury and the court held that this fact was immaterial as under the 2nd Section of the Federal Employers' Liability Act plaintiff was entitled to recover by reason of the fact that Arizona was a Territory at that date. (Rec. page 108.-109. folio 497....510..)

7th. The question of sustaining plaintiff's objections to and excluding the testimony of witness Kelly offered by defendant was raised by exception to the action of the court. (Rec. page..... folio...380.-381....)

8th. The question of sustaining plaintiff's objections to and excluding the testimony of witness

Kline offered by defendant was raised by exception to the action of the court. (Rec. page. ~~346~~ . ~~347~~ folio)

9th. The question of error in the Court's charge on the subject of the assumption of risk was raised by defendant at the close of the evidence before reading the general charge of the court to the jury. (Rec. page. ~~617~~ . . . ~~493~~ . . . folio)

10th. The question of error in that part of the Court's charge in reference to the rule of damages was raised by defendant objecting to the same before reading the general charge by the Court to the jury. (Rec. page . . . ~~619~~ folio)

12th. The question of error in that part of the Court's general charge in respect to the wilful conduct of plaintiff by exception duly made and allowed before the general charge of the Court including the part objected to, was read by the Court to the jury. Rec. page. ~~494~~ - ~~620~~ folio)

13th. The question of error on the subject of failure of plaintiff to obey signals given him to stop by the prompt observance of which he might have stopped his engine, must be wilful and intentional in order to exempt the defendant from liability for the alleged injury, by objection of defendant before reading the charge to the jury including that part objected to and before the jury had retired to consider their verdict. (Rec. page ~~494~~ folio)

14th. On the subject of the competency of the testimony of Dr. Stark, a witness offered by defendant, to prove the condition of plaintiff in respect to the injuries alleged to have been received at the

date of the accident and particularly as to the condition of plaintiff's eye about two months subsequent to the date of the alleged injury, by excepting to the action of the Court in sustaining the objections of plaintiff to the testimony of the witnesses. (Rec. page. 458. - 476. folio.....)

- 15th. The question of the Court's error in refusing to give to the jury instructions offered by defendant was raised by defendant's exceptions to the action of the Court before the retirement of the jury. The instructions offered and refused by the Court will be found under defendant's Assignment of Error No. 15. (Rec. Page. 621. - 624. folio.....)
- 16th. As the error complained of under this Assignment is the same as that urged under No. 12, reference is hereby made to said number for authorities supporting the same. (Rec. page. 476. folio.....)
- 17th. The question of damages being excessive was raised by defendant's motion for a new trial as error under paragraph 18 of its motion for a new trial. (Rec. page. 103. folio.....)
- 18th. The question of the sufficiency of the evidence to sustain the verdict and judgment was raised by paragraph 18 of defendant's motion for a new trial. (Rec page. 108. folio.....)
- 19th. The question of the verdict of the jury and the judgment of the Court being against the law was raised by defendant in paragraph 19 in its motion for a new trial. (Rec. page. 108. folio.....)
- 20th. The question of the competency of the testi-

mony of Dr. Deitrich whose deposition was offered in evidence on the part of defendant was raised by defendant in its exception to the order of the Court excluding said deposition. (Rec. page 664-670. folio.....)

The demurrers were over-ruled; the several motions by the Court denied (Rec. page..... folio.....). The trial resulted in a verdict and judgment in favor of defendant in the sum of \$12,675. Motion for new trial filed and over-ruled and the cause is in this court for review on writ of error.

ASSIGNMENT OF ERROR NO. 1.

The Court erred in over-ruling defendant's General Demurrer to the second amended complaint for the reason that said complaint nor neither count thereof, stated facts sufficient to constitute a cause of action. As the same objection was urged in defendant's motion for judgment under assignment of error (No. 5) made before the introduction of any evidence in the cause. Rec. page 62-63. folio..... (We shall consider them together.)

It is fundamental that in order to state facts constituting actionable negligence, some duty of the master must be alleged, its violation and resulting injury to the servant.

McAndrews vs. Chicago L. S. & E. Ry. Co. 78 N. E. 603.

It is also a familiar principle of the law covering the relation of master and servant "that the limit of the master's duty is to exercise ordinary and reasonable care having regard to the hazards of the service, to provide his employees with reasonably safe appliances, machinery, tools and working places, and to exercise ordinary care to keep them in reasonably safe condition of repair."

Choctaw & G. R. Co. vs. Holloway, 114 Fed. 458.

In this case Judge Sanborn, speaking for the Court, after stating the duties of the master, states the rule in respect to the servant as follows:

“A servant may assume that his master has discharged this duty, unless he knows, or by the exercise of reasonable care he would have known, that the duty had not been discharged, and that there were defects in the machinery and appliances with which or in the place in which he undertakes to work. On the other hand the servant assumes all the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to a person of ordinary prudence and care by the exercise of ordinary diligence. It is his duty to exercise reasonable diligence, to observe and be cognizant of all obvious defects in the machinery and appliances with which he is working; and he assumes the risks and dangers of all such defects of which he has knowledge, and of which he would have had knowledge by the exercise of ordinary care and diligence.”

This case was affirmed by the Supreme Court of the United States. 191 U. S. 334.

And the principles announced is the law of this case unless changed or modified by Section 4 of the Employers' Liability Act (1908), which provides that an employee shall not be held to assume the risk of his employment in any case where the violation of such common carrier of any statute enacted for the safety of the employee contributed to the death or injury of said employee, and as it is not contended in this case that the injury complained of resulted from the viola-

tion of any statute enacted for the safety of the employee, the assumption of the risk remains as at common law.

Neil vs. Idaho and W. N. R. Ry. 125 Pac. 231, 236.

Under this rule the servant by the terms of his employment agrees, expressly or impliedly, that the dangers obviously incident and those which he knows, or could have known by the exercise of reasonable care are at his risk. As said by Judge Taft, speaking for the Court of the 6th Circuit:

“Assumption of risk is a term of the contract of employment, express or implied, from the circumstances of the employment by which the servant agrees that dangers of injury obviously incident to the discharge of the servant’s duty shall be at the servant’s risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; *but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume.*”

Narramore vs. Cleveland C. C. & St. L. R. Co. 96 Fed. 298.

Chesapeake & O.R. Co. vs. Hennessey 96 Fed. 413.

St. Louis Cordage Co. vs. Miller 126 Fed. 492.

Schlemmer vs. Buffalo R. P. & R. Ry. Co. 220 U. S. 590.

The first question presented is whether the ob-

jections can be raised by general demurrer, or motion for directed verdict. While the authorities agree that the assumption of the risk is a defense, yet it is well established, and sustained by text writers and decisions both Federal and State, that no cause of action accrues to the servant for injury resulting from risks assumed. For the reason that the master violates no duty in failing to protect him from such risks and dangers. Hence to state a cause of action in personal injury cases, it is essential that it should be averred that the servant had no knowledge of the risks or dangers. For the reason that if he did know and voluntarily remained in the service, he is deemed to have assumed the risks as incident thereto.

The plaintiff in his amended complaint alleges defendant had actual knowledge of the conditions at date of the accident. But he fails in said complaint to allege want of knowledge actual or constructive on his part.

In order to state a cause of action alleged to have been caused by carelessness and negligence of the master, it must be shown affirmatively that the master was in possession, or might by the exercise of ordinary care have been in possession of knowledge of the dangerous character of the work, *which knowledge was unknown, and by the exercise of ordinary care, prudence and intelligence on the part of the employee could not have been known to him.*

Thompson vs. Chicago M. & St. P. Ry. Co. 18 Fed. 239.

In the case of Dixon vs. W. U. Tel. Co. 68 Fed. 630, Mr. Justice Baker, on the subject of complaints in personal injury cases states the rule in the following language:

“A complaint in an action for personal injuries resulting from insufficiency or unsafe condition of the appliances furnished by

the employer to his servant, *which does not allege that such insufficiency was known, or might have been known to the employer, and was unknown to the servant is fatally defective.*

The same principle is announced and sustained in the case of Bohn Mfg. Co. vs. Erickson, 55 Fed. 493.

The Supreme Court of Indiana in a very recent case decided February 13th, 1913, on the subject of pleading in accident cases uses this language:

"In an action for injury or death of a servant, the complaint must aver facts showing that the servant did not assume the risk of danger."

Standard Cement Co. vs. Minor, 100 N. E. 767.
(Advance sheets N. E. Rep. March, 11, 1913.)

The Supreme Court of Idaho in the case of:

Minty vs. U. P. Ry. Co. 21 Pac. 660, in passing upon the question of pleading in this class of cases uses this language:

"He (servant) must show the injury did not arise from a defect obvious to himself, or which by the use of ordinary care, he might have known. Before the servant can recover he must show it was not from hazard incident to the service."

The Supreme Court of Illinois, in a recent case lays down the rule of pleading in accident cases in the following language:

"The duty and liability are the same with regard to the place of work and the appliances with which the work is done; and the

rule is that the servant, in order to recover, must establish three propositions:

First the existence of the defect; second, that the Master had notice thereof, or in the exercise of ordinary care would have had knowledge of it; *and third that the servant did not know of the defect*, and had not equal means of knowing with the master."

Lake Erie & W. R. Co. vs. Wilson, 59 N. E. 573.

The Supreme Court of Indiana in the case of:

Salem Bedford Stone Co. vs. Hodds 42 N. E. 1022; lays down the rule on this subject as follows:

"Another rule, now firmly established is that, where the servant knows of the defect in the machinery, or the danger in the place where he is working, ***** or the want of skill of fellow servants, and with such knowledge voluntarily continues in such employment, he thereby exonerates the master from liability and is held to have assumed the risks incident to such defects, dangers, or want of skill. Out of this rule has necessarily grown the conclusion that the action for a violation of the employer's duty, involves more than mere negligence, and contributory negligence, *and includes a denial of the assumption of the hazard. A failure to negative the assumption of which renders the complaint bad.*"

Dixon vs. W. U. Tel. Co., 68 Fed. 630.

Bethlehem Iron Co. vs. Weiss, 100 Fed. 45.

Glavin vs. Boston & M. R. R., 100 N. E. 614 (advance sheets N. E. Rep. Feb. 15, 1913.)

Peterson vs. New Pittsburg Coal & Coke Co. 49 N. E. 8.

Mr. Clark in his testimony in answer to following question:

"So far as you know during the two years you were engineer on the switch engine were the brakes set upon the cars left standing on the main line before being switched up the Shannon switch?"

To which he replied:

A. "So far as I know there was not any brakes set on them at all."

Q. That was true during entire two years that you had charge of the switch engine?

A. Yes, sir. (Rec. p. 188).

The Supreme Court of Massachusetts in the case of *Glavin vs. Boston & M. Ry.* 100 N. E. 614 (advance sheets Fed. Rep. Feb. 19, 1913) uses this language:

"Where an employee's testimony showed that he fully understood the danger of his employment the employer could not be held liable for failure to give further warning or instructions concerning such dangers."

Second amended complaint of plaintiff tested by the rule established by the authorities cited is fatally defective in failing to state facts sufficient to constitute cause of action and we respectfully submit the Court erred in over-ruling defendant's general demurrer to said complaint and each count thereof and in denying defendant's motion for a directed verdict.

ASSIGNMENT OF ERROR NO. 2.

The Court erred in over-ruling defendant's special demurrer to that part of plaintiff's second amended complaint beginning on page 3 with the words "that portion of defendant's said Railroad track" and ending with the words "an injury hereinafter mentioned" for the reason that the same is a conclusion; simply an opinion of the pleader.

The Court also erred in over-ruling defendant's

special demurrer to that part of plaintiff's second amended complaint on page 4 beginning with the words "that plaintiff's said injuries were also caused by the insufficient number of brakemen to manage said cars; the said Railroad bed was defective and unsafe; that said brakes on said cars and coupling apparatus was out of repair and unsafe; that defendant did not inspect its road bed and said cars and did not furnish plaintiff a reasonably safe place in which to perform said work and that defendant and its said servants so negligently and carelessly ran, managed and operated said freight cars and engine whereby said collision was caused and plaintiff injured as aforesaid," for the reason that no facts are alleged showing negligence upon the part of defendant, same being merely a conclusion of law and the opinion of the pleader.

Mobile Savings Bank vs. Board of Supervisors, 22 Fed. 580.

James vs. City Investing Co., 188 Fed. 513.

ASSIGNMENT OF ERROR NO. 3.

The court erred in over-ruling defendant's motion to make said complaint and each count thereof more definite and certain in to respect the number of brakemen employed by defendant was insufficient, and how said insufficiency; if any, caused or contributed to plaintiff's alleged injury, in what respect the road bed was defective and unsafe and how said defective and unsafe road bed, if any, caused or contributed to the cause of plaintiff's alleged injury; in what respect was the coupling apparatus out of repair and unsafe and how said want of repair or unsafe condition contributed or caused the alleged injury; in what respect defendant failed to furnish plaintiff a safe place in which to perform his work and how such unsafe place, if any, caused or contributed to cause plaintiff's alleged injury and in what respect defendant and its servants negligently and carelessly ran, managed and operated its cars and

engine and how such careiess and negligent operation, if any, caused or contributed to cause the alleged injury.

The courts of the United States are governed and controlled by the course of procedure of Civil causes adopted by the Courts of the State, unless such procedure is in conflict with Section 912. Rev. Statutes of the United States.

Rev. Statutes of Arizona, 1901, No. 1356 provides as follows:

"If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion, and when a pleading is double, and does not conform to the statute, or when allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may strike it out on motion or require it to be amended."

In defendant's motion to make more definite and certain the Court's attention was particularly directed to the indefinite and uncertain allegations in respect to the number of brakemen employed by defendant at the date of said accident. Said indefinite and uncertain statement beginning with the words "plaintiff further says" and ending on page 7 with the words "and plaintiff injured as aforesaid." Also to the indefinite and uncertain statement in respect to brakes and coupling apparatus on the cars and in respect to the indefinite and uncertain statement that the brakes and coupling apparatus were out of repair and unsafe and to the further indefinite and uncertain allegation that defendant failed to discharge its duty in respect to the inspection of the cars and to the further indefinite and uncertain statement in respect to the unsafe road bed and the further indefinite and uncertain statement in reference to the defendant's failure to furnish plaintiff with a safe place in which to perform his work and

the further allegation in reference to the negligent and careless management and operation of its cars the date of the accident. Paragraph 1289 R. S. Ariz. 1901, provides as follows:—

“The complaint shall set forth clearly the names of the parties, a concise statement of the cause of action, without any distinction between suits at law and in equity, and shall also state the nature of the relief which he demands.”

The legal conclusions which are simply the opinion of the pleader violates this express command of this paragraph of our Statute and under paragraph 1356 above cited a remedy is provided for the correction of pleadings defective in this respect.

In support of the position of plaintiff in error that the several allegations specifically pointed out in defendant's motion to make more definite and certain are indefinite and uncertain and conclusions of law and opinions of the pleader, we cite the following cases:—

- Mallory vs. Globe Boston C. M. Co. 11 Ariz. 296;
- Mobile Savings Bank vs. Board of Supervisors, 22, Fed. 580;
- Florence Oil & Refining Co. vs. Farir, 109 Fed. 254;
- Southern Pac. Ry. Co. vs. Campbell, 189 Fed. 182;
- In re Dunn 181 Fed. 701;
- School Dist. No. 2 vs. Shuck, 113 Pac. 511;
- Kirkpatrick vs. City of Dallas, 115 Pac. 424;
- Stratton's Independence Ltd. vs. Sterrett, 117 Pac. 351;
- Allen vs. Cooley, 31 S. W. 630;
- Tel. Co. vs. Patterson, 1st Nev. 150;
- Leitham vs. Cusick, 1st Utah, 224;
- Kenney vs. Turner, 15 Ill., 182.

Allegations in pleadings that the acts averred were "rightful" or "wrongful," presents no issue of fact and creates no legal liability. They are the expressions of the opinions of the parties with respect to their legal rights.

The facts relied upon to constitute negligence must be pleaded:—

- Rutheford vs. Foster, 125 Fed. 187;
- Hieronymus vs. N. Y. Nat. Bldg. & Loan Ass'n,
101 Fed. 12;
- Picotte vs. Watt, 31 Pac. 805;
- Griffith vs. Wright, 58 Pac. 582;
- Fogg vs. Ry. Co., 23 Pac. 840;
- Webber vs. Dillon, 54 Pac. 894;
- Carlile vs. People, 59 Pac. 48;
- Callahan vs. Broderick, 56 Pac. 782;
- People vs. Cobb, 51 Pac. 523;
- Gould vs. Railway Co. 1st Otto 526-416.

A motion to require a complaint to be made more definite and certain will be sustained even though the complaint may be sufficient as against a general demurrer.

Southern Elec. Ry. Co. vs. Hageman, 121 Fed. 262.

Conclusions of law express merely the opinion of the pleader.

Grand Val. Irr. Co. vs. Leshner, et al., 65 Pac. 44.

Conclusions are not facts.

Heber vs. Dillon, 54 Pac. 894.

The allegation that the "road bed was defective and unsafe" and the allegation that "the grade was so steep that cars would not stand without being blocked or the brakes set" are mere conclusions of law.

Mobile Savings Bank vs. Board 22 Fed. 580.
 City of Logansport vs. Kihm, 64 N. E. 595;
 City of Buffalo vs. Holloway, 7 N. Y. 492.

Facts from which duty springs must be alleged.

Anthony vs. Waters, 62 N. E. 505;
 History Co. vs. Dougherty, 3rd Ariz. 387.

For the reason that the several allegations in plaintiff's second amended complaint were indefinite and uncertain defendant's motion to make more definite and certain should have been sustained.

ASSIGNMENT OF ERROR NO 4.

The Court erred in over-ruling defendant's motion to strike plaintiff's second amended complaint from the files, because each count thereof is a duplication, in this that thirteen separate and definite causes of action are alleged in each of said counts involving defendant's liability under the common law and two Federal Statutes, one, the "Safety Appliance Act" and the other "Federal Employees Liability Act," each of said alleged causes of action requiring different proof and to each of said causes of action separate and distinct defenses may be interposed and as to said second count because the several and distinct causes of action therein alleged are merely a summary of the several causes of action alleged in said first count. As to the second count the motion to strike should have been sustained for the reason that the facts alleged are a mere summary of those set forth in the first count of the complaint. The rule is that where the facts alleged in the second count requires neither more nor less evidence to establish it than to establish the cause stated in the first count, that it is duplication, hence defendant's motion should have been sustained.

Lighter vs. Jackson, 35 N. E., 289.

Duplicity is defined a joinder of different grounds of action in the same count to enforce a single right.

Devlicco vs. C. Vt. R. Co., 20 Atl. 953.

The Statutes of Arizona (1901) Paragraph 1356, provides that when the pleading is double, that it states several different causes of action in one count, the court may strike it out on motion or require it to be amended. This is the uniform rule in the Code States:

Pomeroy Code Rem. (1904 Ed.), Sec. 446, page 611;

Also see case cited Note 1, page 612;

Green vs. Hereford 12 Ariz. 85.

The supreme court of Arizona recognizes separate and independent causes of action and permits the same to be alleged in different counts.

Williard vs. Corrigan 8th Ariz. 70.

Chief Justice Street in delivering the opinion of the Court uses this language:

"The plaintiff may set forth the same single cause of action in varied counts, and with differing averments, so as to meet the possible proofs which will for the first time fully appear on the trial. * * * The complaint contained two counts; one alleging a promise to pay, and the other alleging a quantum meruit."

Vendicato Cons. Gold Mining Co., vs. Firstbrook, 86 Pac. 313.

Rutledge v M. Pac. Ry. 19 S. W. 38.

The Supreme Court of Montana in passing upon

this subject, held in the case of *Ramsdell vs. Clark*, 49 Pac. 591.

A complaint avering that defendant had leased a certain mine from plaintiff, and alleging, as a first breach, that defendant had worked the mine for six months, but had failed to pay over half of the net proceeds, as provided by the lease, and, as the second breach, that he had failed to work the mine in a workmanlike and substantial manner, and, as the third breach, that defendants had failed to work the mine at all after six months, sets forth three separate and distinct causes of action were alleged in the same cause.

Laport vs. Cook 38 A. T. L. 700;

Merrill vs. Derring, 22 Minn. 376;

Toledo & N. Ry. Co. vs. Daniels, 21 Ind. 256.

Separate paragraphs, separately numbered, is of itself not sufficient to determine their character as separate and distinct counts.

Merrill vs. Deerring, 22 Minn. 376.

The proper remedy where several causes of action are co-mingled is by motion to strike:—

Fox vs. Rogers, 59 Pac. 538;

Heberlaw vs. Lake S. & M. S. Ry. 73 Ill. App. 261;

Massenbecker vs. L. S. & M. S. Ry. Co., 42 Atl 67.

Union Pac. Ry. Co. vs. Wiler, 158 U. S. 285.

Judge Deady in the case of *McKay vs. Campbell*, 1st Sawyer, 374 (Fed. cases No. 8, 839), in passing upon this question uses the following language:

"Duplicity in pleading is forbidden by both the common law and the Code as tending to prolixity and confusion, but under the Code objection to duplicity is to be made by a motion to strike out the pleading rather than by special demurrer as at common law." He further says in his decision in this case:—

"If a complaint contains more than one cause of action they must be separately stated or it will be liable to be stricken out for duplicity."

This was an action to recover a penalty under the act of Congress, for refusing an elector the right to vote. The complaint contained but one count and alleged therein that the defendant in refusing and wrongfully preventing plaintiff from voting for representative in Congress and for other said officers and for sheriff of the county and other county officers; held to state three separate and distinct causes of action that should have been separately stated and plead separately so as to avoid prolixity and confusion necessarily resulting from jumbling them together in one count.

Thorsen vs Babcock, 36 N. W. 723:

Thompson vs. K. M. Livery Co. 113 S. W. 1128 (214 Mo. 487).

Yazoo Ry. Co. vs. Wallace, 43 S. W., 369;

Bank vs. Bolong, 40 S., W. 411.

Bank vs. Ill. Cent. Ry. Co. 196 Fed. 171. (This was an action under the Federal Employees' Act, 1908)

ASSIGNMENT OF ERROR NO .6.

The Court erred in denying defendant's motion for a directed verdict at the close of plaintiff's evidence as follows:

"Mr. McFarland: We desire at this time to

make a motion and now move the court to direct a verdict for the defendant on the ground that it is not shown at the date of the accident that the defendant nor the plaintiff were engaged in interstate commerce. The uncontradicted testimony in the case is that the plaintiff and the defendant were engaged in switching cars on the tracks—the main line and side tracks— of the defendant within its yards; that the injury is alleged in the complaint to have occurred on the 15th day of March, 1911, while the plaintiff and defendant were engaged in interstate commerce.

The Court: You think, assuming that you are right in that question of law, do you think the complaint may not be sustained—I mean that this case may not be given to the jury upon the issue as to whether this defendant was a common carrier?

Mr. McFarland: I don't think so.

The Court: I know but doesn't it also imply; the very allegation with reference to its interstate commerce business imply that it was a common carrier. They have alleged more than they needed to. But assuming that it was a common carrier and assuming that the necessary effect of the allegations in the complaint to be that the defendant was a common carrier and that the accident occurred at the time we were a territory?

Mr. McFarland: Does Your Honor claim that the mere fact that the railroad company is a common carrier would give jurisdiction under the Federal Employers' Liability Act?

The Court: So long as it were a territory.

Mr. McFarland: But independent of that fact?

The Court: No it would not.

Mr. McFarland: Unless it was interstate commerce?

The Court: That is true.

Mr. McFarland: The Court will have to take judicial notice that we were a territory, though it is not alleged.

The Court: I think I may do that. I don't think it even has to be proven or alleged. The Court

will take judicial knowledge of the change of political status. The motion will be over-ruled.

Mr. McFarland: To which we except."

(Rec. p. 310 - 316...folios.....)

For the reason that the cause of action, if any, as alleged in the first and second counts of his said amended complaint is based upon the first section of the Employers' Liability Act, approved April 26th, 1908, in respect to injuries received by employees while engaged in interstate commerce and the evidence at the close of plaintiff's case failed to show that defendant and plaintiff were engaged in interstate commerce the date of the alleged injury. The undisputed evidence in the case shows that plaintiff and defendant were engaged at the date of the alleged action in switching cars in its Railroad yards at Clifton. This is intra state commerce.

Erie Ry. vs. United States, 195 Fed. 287.

It was conceded by plaintiff in error at the conclusion of his evidence at the trial of this cause that plaintiff and defendant were not engaged in interstate commerce at the date of the alleged accident and injury and the Court in its decision on the motion of the plaintiff for a direct verdict conceded that plaintiff and defendant were not engaged in interstate commerce at the date of the accident and injury, but held that it was immaterial as under the 2nd Section of the Federal Employees Liability Act plaintiff was entitled to recover by reason of the fact Arizona was a territory at that date and plaintiff could recover regardless of the fact that the action was based upon the negligence of the defendant while engaged in interstate commerce. It is a familiar principle that the plaintiff must recover, if at all, upon the cause of action alleged; that he cannot allege one cause of action and recover upon another.

"The general rule is that a complaint must proceed on a distinct and definite theory

and on that theory the plaintiff's case must stand or fall."

Gallious vs. Sandvoal, 106 Pac. 373.

Chicago St. L. & P. Ry. Co. vs. Bills, 3rd N. E. 613.

The rule on this subject is—

"A plaintiff must recover according to the allegations of his complaint or not at all."

Thompson vs. Citizen's St. R. Co. 53 N. E. 462.

McMahan vs. Canadian Pac. Ry. Co., 66 Pac. 708;

So. Kan. Ry. Co. vs Griffith, 38 Pac. 478;

Pomeroy's Code Rem. (4th Ed.) Sec. 447 (553) and cases cited in Note 2, page 614.

U. P. Ry. Co. vs. Wyler, 158 U. S. 285.

Seymour vs. Franklin, 92 Fed. 122.

Metropolitan Life Ins. Co. vs. Hartman, 174 Fed. 801

Union Cas. Sur. Co. vs. Bragg 65 Pac. 272.

Johnson vs. State Bank, 52 Pac. 860.

ASSIGNMENT OF ERROR NO. 7.

The Court erred in sustaining plaintiff's objection to and excluding the testimony of witness Kelly offered by the defendant by whom defendant proposed to show the carelessness of plaintiff in handling his engine and disobeying signals while operating his engine in switching cars in the yards of defendant, to sustain plaintiff's carelessness and negligence, defendant propounded to witness the following questions and the witness made answer thereto as follows:

Q. How long has Mr. Clark been operating that engine in switching cars in that yard?

A. Well, I think up to that time about two years Mr. Clark had been on that engine, around about that

time, as regular engineer—what we call regular man on the engine.

Q. Do you know whether he is a careful or negligent man—engineer—in the operation of his engine in switching cars?

Mr. Seabury: We object to the question as incompetent, irrelevant and immaterial.

The Court: I sustain the objection.

Mr. McFarland: We except to the ruling of the Court.

(To the witness.)

Q. Do you know of any instances prior to the accident, and within the space of two years, where he was negligent and careless in the operation of his engine in respect to obeying signals?

Mr. Seabury: We make the same objection.

The Court: Same ruling.

Mr. McFarland: We except. Now, if the Court please, we offer to prove by this witness that Mr. Clark for two years previous to this injury by this accident was habitually careless and negligent in obeying signals given him while operating his engine in switching cars in the yards of the defendant. We offer further to show by this witness that in many instances which occurred possibly almost daily within two years previous to the happening of this accident that he uniformly and habitually disobeyed signals given to him as engineer in the operation of his engine and this train while switching in these yards.

Mr. Seabury: We object to the offer and again respectfully protest against its being made and ask that it be excluded.

The Court: The ruling made will stand.

Mr. McFarland: It is denied?

The Court: Yes.

Mr. McFarland: To which we except.

Rec. page 380, 381.

ASSIGNMENT OF ERROR NO. 8

The Court erred in sustaining the objection of plaintiff to and excluding the testimony of witness Kline offered by defendant, by whom defendant proposed to show the general reputation of plaintiff as a safe and conservative engineer or as to his general reputation as a careless, reckless engineer. For the purpose of eliciting this testimony, defendant propounded to witness the following questions to which the witness made answer thereto as follows:

Q. You say you have known Thomas Clark how long.

A. About fifteen or sixteen years.

Q. At Clifton?

A. No. I knew him in the Indian Territory.

Q. How long have you known him in Clifton?

A. A little over twelve years.

Q. Do you know his general reputation as to being a safe and conservative engineer or as to his reputation of being a reckless engineer in the operation of his engine?

Mr. Seabury: We object—it is clearly incompetent and inadmissible.

The Court: I sustain the objection.

Mr. McFarland: We except to the ruling of the Court.

(to the witness.)

Q. Do you know whether his methods and mode of operating his engine is of a safe and conservative character—I withdraw that—whether his mode of operating his engine in the yards of the Company in switching cars is careful, or whether his method and mode of operating his engine in switching cars in the yards of the Company is reckless and careless?

Mr. Seabury: We make the same objection, and we further object to the repeated offer of evidence which counsel must know to be incompetent, solely for the purpose of putting such inferences into the jury's mind—that constitutes reversible error.

Mr. Kibbey: We think that that statement is entirely uncalled for—we think this is competent evidence.

Mr. Seabury: We can't conceive of that being competent evidence.

The Court: Upon what theory do you think it is competent.

Mr. McFarland: On his method and mode of operating his engine—he said he was careful.

The Court: Careful in that particular instance?

Mr. McFarland: Generally.

The Court: I don't recollect that he was asked as to that.

Mr. McFarland: That goes to the question as to whether he was a careful, painstaking operator with his engine, or whether he was a careless and reckless man.

The Court: Suppose he was careless and reckless—you seek to establish something from which it may be inferred in hiring him or suffering him to work so as to injure the lives of other workmen; but as establishing whether in a particular instance a workman was careless or otherwise, I know of no instance where proof of general reputation of that is admissible.

Mr. Bennett: Possibly not general reputation, but I understand he worked with Mr. Clark in the same switching crew and that he did know of his usual and general conduct in reference to switching and handling his engine.

The Court: I should think as far as the matter could go in that way would be to admit proof of instances of like omissions to take the ordinary methods of caution, but not his impression—not his opinion—as to that matter.

Mr. McFarland: Note our exception.

(to the witness.)

Q. Do you know of Mr. Clark's habits—I withdraw that. Do you know whether as a general rule Mr. Clark obeyed signals or whether he ignored signals?

Mr. Seabury: We object to the questions as incompetent, irrelevant and immaterial.

The Court: I think the objection is equally good to that question.

Mr. McFarland: We except.
(to the witness.)

Q. Do you know of instances where Mr. Clark disobeyed signals?

Mr. Seabury: We object to that question also. The issue here is not whether Mr. Clark was careless about obeying signals.

The Court: Suppose the evidence be conflicting on that point? Suppose, assuming that the evidence indicates—the evidence put in by the defendant here indicates—that he didn't respond promptly to the signal to stop or didn't cut off the steam. Now there is an issue of fact. Would it not, under that circumstance, be competent to show that in other instances the defendant was likewise slow to respond to the signal, or careless?

Mr. Seabury: We think not. Assume for the sake of argument that he was careless—careless on other occasions—yet on the occasion of the injury he might have been proceeding with care.

The Court: Would it lend anything to the probability of the case?

Mr. Seabury: We think not, and contend it is absolutely incompetent to receive such evidence, even assuming that they have it to produce, which we do not concede.

The Court: The individual element—the human element—is a factor in all these matters—some men are slow or quick to respond to signals of danger. Now, how is the jury to determine which of these contributing theories of fact is the true one unless they have all the light that can be thrown on that including the individual factor?

Mr. Seabury: We want them to have all the light that can be thrown upon the issue here. We say all that light comes from the evidence of these witnesses

as to what took place on this occasion, and that can be the only test.

The Court: But suppose those witnesses are sharply conflicting?

Mr. McFarland: Yes sir, a fact from which the jury may infer whether this was careless and reckless or not.

Mr. Bennett: It seems to me the evidence is admissible in this view of the matter. Mr. Clark testified as also did Mr. Chambers, the fireman, that immediately on receiving the washout signal he shut off the steam and applied the air. The witness now on the stand testified that it was impossible for him to testify that that was true, but he did testify that the exhaust was working when the engine reached the place of collision, which if true, contradicts the statement of Mr. Clark that he shut off the steam. Now, in order then that the jury may determine which of these facts are true, the usual, habitual conduct of Mr. Clark in the operating of his engine or his usual and habitual manner of operating his engine in such yards would be illustrative and would enable the jury to determine which would be the most likely to be true.

The Court: Possibly if this witness knows of instances of carelessness that might go to the jury, but I doubt whether his opinion as to whether he is a safe operator is competent evidence. I don't know of any instance where one workman was permitted to state his opinion as to whether the other fellow was a safe workman or not, whether he had that reputation or not, unless that be the issue, as, for instance, whether the employer was negligent that he was careless and reckless in this particular instance?

Mr. Seabury: Then it is for the jury to determine.

The Court: Then may they not consider which the more probable theory?

Mr. Seabury: That may be true, but we say they may not consider which is more probable if it is based

on evidence which is not competent because it does not relate to the matter involved.

The Court: But Mr. Clark was there—he was the actor in the matter. Suppose his hearing or sight was bad and sharp hearing or sight had something to do with his conduct, would it not be admissable to show his defective hearing or acuteness of sight or defective sight or acuteness of hearing as the case may be?

Mr. Seabury: We think not, and we say further in answer to that that if he had any defective sight or hearing it was the duty of the defendant to discover it.

Mr. Kibbey: He can't complain of that.

The Court: This evidence is only admissable on the theory that it shows contributory negligence.

(Thereupon the question is argued further to the Court, the further argument not being taken down by the reporter.)

Mr. Seabury: There is another ground of objection. Any question however framed, calling for other acts, practically asks the witness to state whether he exercised care on those occasions or not—the question is practically did he exercise care on other occasions.

The Court: I am in doubt about it. The objection will be sustained. I think it is safer.

Mr. McFarland: We except. Now, I desire to put the question a little more definitely so as to get it into the record in better shape.

The Court: You may do so.

By Mr. McFarland:

Q. Do you know of any instances on other occasions previous to this accident where Mr. Clark failed or refused to obey signals given him?

Mr. Seabury: We make the same objection.

The Court: The objection is sustained.

Mr. Kibbey: May we, in order to preserve our exception, state what we desire to prove?

The Court: I think it is already apparent. The argument has developed that.

Mr. McFarland: If there is any doubt about it we would like to state it.

Mr. Seabury: We object to the statement of what they desire to prove, and ask that counsel put their question to the witness. I shall object to any offer made for the purpose of a bill of exceptions.

The Court: I think this conference is absolutely unnecessary. I think if a bill of exceptions is necessary to be prepared in this case the court can find upon the record here enough without stating—repeating the statements—to put into the bill of exceptions to indicate the purpose of the offer. That is all you desire.
 Rec. p. 345. - 351. folio. 631. - 633.

As assignments of error No. 7 and 8 involve the same question they will be considered together. One of the issues in this case was the care of the plaintiff and any evidence showing or tending to show want of care was material.

The general reputation of the servant for care and skill may be shown. This general reputation is shown by proof of specific acts.

Frasier vs. Penn. Ry. Co. 38 Penn. St. 104.

Carnegie Steel Co. vs. Penn. Ry Co. 173 Penn. St. 104.

Lakeshore & M. S. Ry. Co. vs. Stupak, 23 N. E. 246.

ASSIGNMENT OF ERROR NO. 9.

That the court erred in that part of its charge limiting and qualifying the general rule of the assumption of the risk as follows:

“But that principle of assumption of risk does not apply unless the danger is one that is so open and obvious as to be readily observable by a person of ordinary intelligence in his situation by the exercise of his powers of observation so far as consistent with his duty as such employe. Another condition affecting the doctrine of assumption of risk is that the plaintiff must not only have seen the dangers but also have appre-

ciated them. In determining this question, you have a right to take into consideration the nature of the employment the plaintiff was engaged in, and whether the duties of such employment prevented the plaintiff from making a close inspection, his opportunity to observe and take notice of the dangers of his employment at the time injured, and whether or not his opportunity for making such close inspection of the dangers was in any way affected by his other duties, and whether the requirements of his service as such engineer also affected his capability of comprehending the dangers which might otherwise have been more plainly visible to one not so engaged.

Now, to the doctrine of assumption of risk, it should be added that if certain of the dangers or dangerous conditions attending the work were so open and apparent that the plaintiff could be held to assume the risk under the rule I have stated, but if there were other dangers not open and visible, and but for this latter class of dangers the injuries would not have happened then the fact that he is chargeable with the assumption of risk in a portion of the dangers would not prevent recovery if the dangers with which he is so chargeable would not in themselves have produced the injury.

To the doctrine of the assumption of risk should be added the further qualifications that the plaintiff did not assume the risk of any danger which arose in whole or in part from the negligence of any officer, agent or employe of the defendant."

That the Court erred in that part of its charge limiting the assumption of risk by the employe to defects in works or dangerous conditions and excluding therefrom the obvious risks of dangerous operation and because the same imposes the burden of proof upon the defendant that the danger, if any, was one of those that the law declares plaintiff to have assumed.

The rule of law supported by the decided weight of authority on this subject is:—

"The servant assumes all the ordinary

risks of the employment which are known to him and which would have been known by the exercise of ordinary care to a person of reasonable prudence and diligence in his situation. It is his duty to exercise ordinary care and diligence to observe and become cognizant of obvious defects in the machinery and working place; and he is chargeable with a knowledge and assumption of the risk of all such defects which are known to him, or which would have been known by the use of ordinary care to a person of reasonable prudence and diligence in his situation."

Choctaw O. & G. R. Co. vs. Holloway, 114, Fed 458.

The part of the charge complained of violated this rule in limiting the risks assumed to open and obvious risks and excluding from the consideration of the jury other risks and hazards which were known to plaintiff or which would have been known to him by the use of ordinary care to a person of reasonable prudence and diligence in his situation.

The Court in this part of its instructions assumes that there is only one class of risks assumed by plaintiff, that is those that are open and obvious, which violates the rule that servants assume other risks incident to the service which he knew or may have known. There is only one escape for the servant who remains in the service of the master with an actual or constructive knowledge of defects of place and operation and that is where he complained of the hazard incident to risk and the master promises to repair, he may remain a reasonable time under this promise to enable the master to fulfill his promise. This is the only exception to the doctrine of assumption of the risk. As there is no pretense in this case of any request by the servant or promise by the master the unquestionable weight of authority is that if he remains in the service of the Company with the

knowledge, actual or constructive, he assumes the risk and cannot recover.

Notthoff vs. L. A. Gass Co. 118 Pac. 436.

C. B. & Q. Ry. Co. vs. Shalstrom, 195 Fed. 725.

ASSIGNMENT OF ERROR NO. 10.

The Court erred in that part of the general charge to the jury as follows:

“If the plaintiff be guilty of contributory negligence, and his negligence and that of the defendant company be equal, the jury will give an award of one half the damages it would have given if he had been free from negligence; or if he be twice as negligent as the defendant company, then one third would be the proportion of the damages he shall receive, and so on, whatever the proportion may be.”

Because this instruction invaded and usurped the province of the jury in determining the question of damages. Mr. Thornton in his recent work on the Federal Employer's Liability Act, on the subject of apportionment of damages under this law lays down the rule on this subject as follows:

“It is true the Court can not lay down rigid rules for the apportionment of damages in a particular case. This is a fact that must be left to the jury, practically without direction.”

Thornton Federal Employer's Liability (1912 Ed.) p 141, Sec. 88.

ASSIGNMENT OF ERROR NO. 11.

The Court erred in that part of its charges as follows:

"That is subject to the qualification, that if the contributory negligence or the negligence of the plaintiff was so *wilful* and of such character as the jury might say that it was the direct cause of the injury, then the plaintiff could not recover by reason of such negligence."

This part of the Court's charge is error for the reason that it in effect told the jury that negligence on the part of the plaintiff, that would defeat his recovery must have been intentional, voluntary, purposely, in other words the result of present or pre-meditated design.

This instruction violates the universal rule on the subject of contributory negligence. "Contributory negligence" that will bar a recovery for injury by the plaintiff is such negligence as amounts to an absence of *ordinary* care on the part of the plaintiff."

Johnson vs. International & G. N. R. Co. 57 S. W. 869.

Dell vs. Phillips Glass Co. 32 Atl. 601, 602.

Fritz vs. Western Union Tel. Co. 71 Pac. 209.

Henry vs. Cleveland C. C. & St. L. R. Co. (U. S.) 67 Fed. 426.

Above charge is also in conflict with section 3 of the Federal Employer's Liability Act, which provides that where one may have been guilty of contributory negligence, shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. The expression of "Contributory negligence" used in this section, must have been intended by Congress to be construed according to the uniform definition of this expression by the text writers and decisions.

Mr. Justice VanDevanter speaking for the Court in the case of,

Mondou vs. N. Y. N. H. & H. R. Co. 223, U. S. 1.

Interpreting the Federal Employer's Liability Act found no occasion to interpret negligence or contributory negligence other than the same is uniformly defined and interpreted. And the fact that in his interpretation of this act, he was not led to say that in order to relieve the servant that his acts and conduct must have been *wilful* in order to defeat his recovery, to say the least is persuasive that Congress never intended that such was the intent of the act.

ASSIGNMENT OF ERROR NO. 12.

The Court erred in that part of its charge as follows:

"I charge you further that even if the defendant left cars under circumstances detailed in this case on the main line with the brakes unset, and if cars by reason of gravity did move to and upon the switch to the point of collision, yet if plaintiff was warned of danger and given a signal which required him to immediately stop his engine, and if he had promptly obeyed such danger signal, he could with the means at his disposal have stopped his engine and thus avoided the collision, and he then *wilfully* or purposely did not do so, then the negligence of the defendant, if any, is not the approximate cause of the alleged injury, and the plaintiff cannot recover."

As assignments 11 and 12 involve the same principles they have been considered together.

ASSIGNMENT OF ERROR NO. 13.

The Court erred in sustaining plaintiff's objections to the testimony of Dr. Stark, a witness offered

by the defendant to prove the condition of plaintiff in respect to the injuries alleged to have been received at the date of the accident, and particularly as to the condition of plaintiff's eye, about two months subsequent to the date of the alleged injuries, it not having been shown that the relation of physician and patient existed between the witness and the plaintiff at that time. The evidence as to the incompetency and disqualification of the witness is in substance as follows:

"I reside in El Paso, Texas. I am a physician and surgeon, and have engaged in the practice for sixteen years—in St. Louis and El Paso—two years in St. Louis and fourteen years in El Paso. I am a graduate of the Medical Department of St. Louis University. My specialty is eye and ear work. I have done nothing but this for the last six years. I know T. B. Clark, having known him since June, 1911. I first saw him at Clifton, at the request of Mr. A. T. Thomson, who was at that time connected with the defendant railway company. Mr. Thomson employed me to visit Mr. Clark at Clifton. At that date I examined Mr. Clark at the A. C. hospital. I made an examination of his eyes. * * *

At this point Counsel for plaintiff asked leave to cross-examine witness with purpose of showing the witness disqualification and incompetency. Which was granted by the Court.

In response to questions propounded by counsel for plaintiff witness answered substantially as follows:

"I examined Mr. Clark in June, 1911, at the hospital of the defendant company, in Clifton, Arizona, under the direction of Mr. Thomson. It was at his request that I examined him. I went to Clifton especially for that purpose. Mr. Thomson did not conduct the hospital. I made the examination there for the reason that it was the only place suitable for such examination. I made the examination simply because

Mr. Thomson requested it, without consulting the medical forces. Mr. Thomson wanted the case examined. I was in the employ of the company at that date and had no connection or affiliation with the medical department, or with its hospital. Mr. Thomson paid me my fee for the examination; he was in charge of the railway company. The time covered by the examination was probably one-half or three-quarters of an hour. It was some time during the morning. Mrs. Clark was present. There might have been others present; perhaps Dr. Deitrich. It was in the x-ray room. This room was selected for the reason that it was dark. I had a conversation with Mrs. Clark at the time. I know that during the larger part of the time there was no one present but Mr. Clark, Mrs. Clark and myself. There was no other doctor present, though Dr. Deitrich might have come in I am not positive, however, as to this; he did not participate in the examination. I had never met Mr. Clark before. I don't know who introduced me to him; possibly the nurse. I don't know whether I was introduced to him in the capacity of physician or not. I think I told him that I was a doctor. I remember that I told him that I was there to examine him, and he consented to it. I don't remember whether I told him of my employment by the company. I don't remember as to this. I don't know whether Mr. Clark assumed that I was a regular physician of the company or not. I cannot say what Mr. Clark assumed. I don't remember having told Mr. Clark that I was from El Paso, though I think perhaps he knew it. In our conversation I think he said he had heard of me. This was not the important thing to me. The time consumed was between one-half an hour and an hour. I derived no information from him as to his condition except at that examination. I knew that he was injured before I came to Clifton. I made no other examination of him except as to his eye. It was not necessary for me to have any information from him to properly diagnose and treat his eye. I could have made the diagnosis and treated him without Mr. Clark saying anything about it."

At this point Counsel for plaintiff asked the Court to permit him to temporarily discontinue the examination of Dr. Stark and call Mr. A. T. Thomson. And the request was granted by the Court. Mr. Thomson testified in substance as follows:

"I had never secured the consent of Mr. Clark for Dr. Stark to examine him. I don't know whether Mr. Clark was advised that Dr. Stark was not one of the regularly employed physicians of the defendant. I compensated Dr. Stark for his services. The compensation was out of the funds of the railway company. The money paid Dr. Stark was not paid him out of the funds of the hospital. The company maintains a medical department and hospital, and did so at this time. The privilege of working in the employment included every medical attention and all the facilities of the hospital. When one is in the employ of the railway company and he is injured is entitled to go into the hospital and be treated in consideration of the fees paid into the Society. The defendant did pay to Dr. Stark for his medical services in attendance upon Mr. Clark in this particular instance. I cannot conceive how Mr. Clark could connect Dr. Stark with the society in any way. The examination took place at the hospital so the Doctor says, I do not know personally anything about it. The hospital does not belong to the railway company or to the Arizona Copper Co. It belongs to the Society."

At this point Mr. Seabury, counsel for the plaintiff renewed the objection to the point, urging it on the ground that it was shown that at the date of examination, there existed the relation of physician and client.

The Court: "I do not think you have shown the relation of physician and client. The best you can say is that the patient may have understood that any communication he gave to the doctor, that the relation existed. Under the testimony thus far advanced, the relation is otherwise."

Mr. Seabury: But if Your Honor please, we claim as a matter of law that when a company undertakes to supply medical treatment to its employees who are injured and actually makes a deduction from the salary or wages of the employees.....

The Court: I understand all of that.

Mr. Seabury: That the lips of that physician are absolutely sealed just as though the retainer had been paid by the plaintiff himself.

The Court: That is unquestionably true, and on that theory I ruled out the declarations of Dr. Deitrich.

Mr. Seabury: We claim further that there is no difference as a matter of law between special employment and a general one.

The Court: I understood that this examination was in reference to this law suit.

Mr. Seabury: There is no testimony to that effect.

The Court: The inference is quite plain from this evidence that this examination was not for the purpose of treatment at all.

Mr. Seabury: I don't know what the purpose of it was.

The Court: If it was of course that ends it.

Mr. Seabury: Suppose for the purpose of negotiating a settlement it would be improper for us to go into the purpose.

The Court: It must be established that he was Mr. Clark's physician.

Mr. Seabury: We admit that but we think that under these circumstances he has a right to claim it.

The Court: You don't think Mr. Thomson's statement that the employment of the doctor was under that Society arrangement whatever that was. He stated quite to the contrary.

Mr. Seabury: I think it was a special arrangement undoubtedly. He testified that the remuneration did not come out of that special fund, but I don't think

that would change the course of conduct of the defendant.

The Court: The thing in my mind is simply this: whether the relation which the doctor sustained was made quite clear or whether the plaintiff knew or whether from the circumstances he had good reason—was put upon notice—that the doctor was not there as his physician in any capacity representing the society or anybody else.

Mr. Seabury: Then the surrounding circumstances do have a bearing for the purpose of this inquiry, whether the relation did exist. That is what I had in mind when we showed all the surrounding circumstances. He examined him under the same circumstances as he might have previously been examined in the hospital under a doctor of the association.

The Court: It doesn't make any difference where it occurred. In his house or elsewhere. If he was there as a hostile witness to get information—not for his benefit but for somebody else's benefit, and if the plaintiff understood that at that time, he certainly—the communication whatever it was, was certainly not privileged.

Mr. Seabury: May I ask if the plaintiff understood that there was a difference between this doctor and Dr. Deitrich, for example? Would that affect the Court?

The Court: I am inclined to think so. The only thing is whether the circumstances were such as to put Mr. Clark upon notice. If he permitted this examination and made statements under the impression and belief that this doctor was there in his interest as his physician, it is privileged in my judgment—whether the fact be one thing or another—it is the attitude which the plaintiff had in the matter.

Mr. Seabury: May I call the plaintiff to ascertain what he understood in that matter.

The Court: Yes.

Mr. Seabury, Counsel for plaintiff propounded

questions to Mr. Clark. He answered in substance as follows:

"I remember the date of examination very well. I never saw Dr. Stark previous to that date. I had not been previously examined by the doctors in that place, I knew however, that it was the hospital. I knew where the hospital was. It was the A. C. in which injured employees of the defendant are examined. I knew this at the date of examination by Dr. Stark. I think Dr. Deitrich requested me to be examined by Dr. Stark. He told me that Dr. Stark would be there for the purpose of examining my eye. I was at that time under the charge of Dr. Deitrich, who was treating me as my physician. I don't know whether the examination by Dr. Stark was made for the benefit of me or for the benefit of the company. I don't know for whose benefit it was made. I suppose it was made for my benefit. That was what I understood. Apparently Dr. Stark was in consultation with Dr. Deitrich, my attending physician."

The Court: I think the communication was privileged. I will sustain the objection.

Witness was further examined by Mr. Kibbey, associate counsel for the defense. To questions propounded witness answered substantially as follows:

"I think Dr. Deitrich was in Clifton at that date. I think I saw him at the date of examination. He might have been in and out. Previous to that date I had no conversation with the company. I suppose that it was for the information of the company that the examination was made. I understood when the examination was made that it was for the purpose of obtaining information for the company.

Mr. Kibbey: Now we think it is competent.

The Court: That answer is contradictory to the other.

Mr. Seabury: Absolutely.

Mr. Kibbey: Yes, it is.

The Court: I will put a question.

Q. What did you understand was the nature of this examination of your eyes?

A. To know whether it was injured or not.

Q. What difference did it make, whether it was injured or not, in your judgment.

A. It would make a whole lot.

Q. In what way?

A. From good sight to blindness—I wanted that information.

Q. Who wanted it?

A. I wanted it.

Q. You wanted it?

A. I wanted to know the condition of it. When I reported to Dr. Deitrich, he said they had no oculist, and that they would get one, and then I left the thing to Dr. Deitrich, and when they made the appointment I appeared there,—I did not know whether Dr. Stark was one of the corps of physicians and surgeons of the society. I heard that he came from El Paso.

Rec. p. 475...folio.....

The Court further erred in this case by holding the burden of proof that evidence is privileged communication upon the one seeking to exclude.

People vs. Austin 93 N. E. 57.

Brown vs. Rome W. & O. Ry. Co. 45 Hun. 239.
(N. Y.)

The action of the Court in sustaining the objections to the testimony of Dr. Stark was clearly erroneous for the reason that the relation of patient and physician did not exist, and Dr. Stark was employed and paid by the defendant company for the purpose of being advised of the condition of patient's eye at the date of examination.

He states positively that he saw Dr. Stark at the instance of Mr. A. T. Thomson who represents the

defendant, and upon the intimation of the Court that that objection to the testimony of Dr. Stark over-ruled in a further examination of plaintiff he testified that the examination was made at the instance of Dr. Deitrich, one of the surgeons of defendant. His evidence is further contradictory in that he testified that the examination was made by the company to find out the condition of his eye; and later in his examination testified that when he reported to Dr. Deitrich, he said that they had no oculist and they would get one. Then he left the whole thing to Dr. Deitrich, and when they made the appointment he appeared for examination.

The objection to the evidence is based upon Subdivision 6 of Paragraph, 2535, R. S. Ariz. (1901) As follows:

"A physician, or surgeon cannot be examined without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient. Provide, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to examination of such physician or attorney."

The objection was sustained on the grounds that communications and examination was of a privileged character and comes within the rule.

Q. I want to get it in the record and state in writing just what I expect to prove.

The Court: Very well! That may be done.

Q. May the records show that we offered Dr. Smith for the same purpose, and that his testimony was excluded.

Printed Rec. p. ~~476~~ 477. . .

The action of the Court was erroneous for the reason that the relation of patient and physician was not established. Dr. Stark was not employed or paid by the plaintiff. The undisputed evidence in the cause shows that Dr. Stark was employed as an expert, by the defendant for the purpose of making an exam-

ination of the patient's eye, with the view of ascertaining the extent of the injury. Plaintiff also testified that he desired this information.

The supreme Court of New York, in construing a statute almost identical with Arizona's; held:

"That it does not apply to an expert, though the knowledge acquired by him while attending the patient professionally."

Myers vs. Standard L. S. & Ins. Co. (8th app. div. 74) 40 N. Y. sup. p. 419.

Herrington vs. Winn (60 Hun. 235) N. Y. Sup. p. 612.

The Supreme Court of Indiana in the case of
C. I. & L. Ry. Co. vs. Gorman 94 N. E. 730.

Held under same statute that a physician was not disqualified in testifying where the physician stated the purpose of his visit, and in no way attempted to treat the one injured. For the reason that under such conditions no relation of physician and patient ever existed.

ASSIGNMENT OF ERROR NO. 14.

That the court erred in refusing to give to the jury instructions offered by the defendant as follows, to-wit:

"If you should believe from the preponderance of the evidence in this case that the defendant permitted the cut of four cars to remain upon the main line after the engine had been detached therefrom, without having set the brakes thereon or having checked the wheels so as to prevent their rolling by their own gravity, and if the plaintiff was apprised of danger of any kind by a signal which the plaintiff knew signified an emergency under the practice in the operation of railroads in like circumstances was equivalent to an order by the defendant to stop as quickly as the appliances and means of operation under the control of the plaintiff

would enable him to stop, and if it appears that the plaintiff could have stopped and so avoided the collision from which his alleged injuries resulted, and that he failed to do so, the proximate cause of the injury was his own negligence, and he cannot recover in this case."

The first paragraph of this charge requested by the defendant correctly stated the law based on the facts of this case.

If the plaintiff was apprised of the danger by the signal, which plaintiff knew signified emergency, and failed to stop his engine, as quickly as the appliances and means of operation under his control would permit, and to have thus been able to avoid the collision from which the alleged injury resulted, then the approximate cause of the injury was his own negligence and he cannot recover.

"When the act of an individual is the primary cause of an injury to himself he has no right to recover therefor at common law. And this rule is unimpaired by the provisions of the Employers' Liability Act that *contributory* negligence shall not bar a recovery. If the injury of an employee is primarily the result of his own negligence, then it cannot be said to be "due to its (the employers') negligence." Nor does such injury result wholly or in part from the negligence "of any of the officers, agents or employees of such carrier under any proper interpretation of the words."

Daughtery on Liability of Employers' Under Federal Liability Act. (1912) p. 60.

"If you believe that the movement of the four cars in question could not, under all the circumstances, have been reasonably prevented, then such movement must be attributable to accident, and if such movement was an accident, the defendant is not liable in this case."

The refusal to give the second paragraph of this charge was error for the reason that if under all the circumstances the movement of the four cars in question, could not have been reasonably anticipated, then such cause would have been attributable to accident.

That was one phase of the case and it was the duty of the Court to charge the jury upon every branch supported by any evidence in the cause.

Dubois vs. Int. Paper Co., 196 Fed. 37.

"Even if the defendant left the cars under the circumstances detailed in this case, on the main line with the brakes unset, and if the cars by reason of gravity did move to and upon the switch to the point of the collision, yet if the plaintiff was warned of danger, or was given a signal which required him to immediately stop his engine within time had he promptly obeyed the signal to have stopped, and thus avoid the collision, and he negligently, or purposely, did not do so, then the negligence of the defendant, if any, is not the proximate cause of the alleged injury, and the plaintiff cannot recover."

Daugherty on Liability under Federal Employers' Liability Act (1912) p. 60.

ASSIGNMENT OF ERROR NO. 15.

Because the court further erred in that part of its charge wherein it instructed the jury that in order to relieve the defendant from liability on account of negligence, the negligent conduct of the plaintiff must be "*wilful and wanton*," for the reasons stated, supported by authorities cited under assignment No. 11.

ASSIGNMENT OF ERROR NO. 16.

The Court erred in denying motion for a new trial, on the ground urged under this assignment; because the verdict of the jury is excessive under the evidence.

In a case brought under the Federal Employers' Liability Act, in the Circuit Court of the United States, E. D. of Tennessee for damages on account of death of an employee, the jury returned a verdict for \$10,000.00. On a motion for a new trial Judge Stan-

ford held this sum excessive and entered an order, providing that if plaintiff within ten days would remit \$2,500.00, motion would be denied, otherwise motion would be granted.

Cain vs. S. P. Ry. Co. 199 Fed. 211.
(Advance sheet, Fed. Rep. Nov. 28, 1912.)

ASSIGNMENT OF ERROR NO. 17.

That the evidence at the trial was insufficient to justify the verdict of the jury.

ASSIGNMENT OF ERROR NO. 18.

That the verdict of the jury is against the law.

ASSIGNMENT OF ERROR NO. 19.

That the court erred in sustaining objections to testimony of Dr. Dietrich, whose deposition was offered in evidence, for the reason that the objections offered by plaintiff on the ground that it was privileged were waived by the plaintiff by filing cross-interrogatories to be propounded to witness, and the further reason that it was not shown that the relation of physician and patient existed between witness and plaintiff covering the time of treatment for the reasons stated supported by authorities cited under assignment No. 13.

The Court erred in sustaining objection of plaintiff to the testimony of Dr. Deitrich, whose deposition was offered in evidence by the defendant. For the reason that the relation of physician and patient was not shown.

And for the further reason that the deposition was taken under a stipulation without any objection by plaintiff as to the competency of witness hence his competency was waived.

The judgment of the Court is erroneous in its allowance of interest on the amount found by the jury.

Interest is not allowed in actions of tort in Federal Court as a matter of right. Its allowance as a part of the plaintiff's damages is discretionary with the jury, unless the jury assesses interest as a part of the Plaintiff's damage the Court has no authority to impose this additional burden on the defendant in absence of its assessment by the jury as a part of the damages awarded. *White et al vs. U. S.* 202 Fed. 501.

(Advance sheets Fed. Rep. Apl. 3, 1913.)

We respectfully submit the verdict is excessive, for the reason it is in conflict with and contrary to the policy of the State of Arizona, as expressed in an act entitled:

An act "securing compensation for injuries to workmen and their dependants, received while engaged in dangerous and hazardous service." Approved June 8, 1912. Sub-division 1 of Sec. 8 of this act provides for the measure and the amount of compensation to servants.

Sub-division 2 of this section provides that in no case shall the amount exceed \$4,000.00.

Under the several assignments of error urged, we most respectfully submit the judgment of the lower court should be reversed, and the cause remanded for a new trial.

W. C. McFarland

 Atty. for Plaintiff in Error

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2259.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY,

Plaintiff in Error,

vs.

THOMAS P. CLARK,

Defendant in Error.

Reply Brief of Thomas P. Clark.

Plaintiff in error will be called defendant.

The defendant contends that the proffered testimony of Dr. Stark should have been received, but has failed to come within the well-recognized rule, in that it was not shown that Dr. Stark before making the examination informed Mr. Clark of the nature, purpose and object of his visit, and that with such knowledge Mr. Clark submitted to the examination, but, on the contrary, it appears from the evidence that Mr. Clark was led to believe that defendant had employed Dr. Stark to make the examination for the benefit of Mr. Clark, and in fact the defendant had deceived Mr. Clark as to the purpose and object of the examination.

The rule is well stated by the Supreme Court of California:

“It seems to me that he occupies a different position than if he had gone there originally upon the suggestion of the defendant, and stated to the patient that he came there solely and entirely at

the request of the defendant, to ascertain the nature and character of her physical injuries, for the purpose of reporting them to the defendant. If he had confined his conduct to such examination and such report, he should have been permitted to testify."

Freel vs. Market Street Cable Ry. Co., 97 Cal. 40;
Chicago, I. & L. Ry. Co. vs. Gorman, 94 N. E.
(Ind.) 730;

Munz vs. Salt Lake etc. Ry. Co., 25 Utah, 220.

Respectfully submitted,

L. KEARNEY,

W. M. SEABURY,

Attorneys for Respondent.

No. 2259

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE ARIZONA AND
NEW MEXICO RAIL-
WAY COMPANY,

Plaintiff in Error,

vs.

THOMAS P. CLARK,
Defendant in Error.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR

For convenience and brevity the (Plaintiff in Error) will be herein designated as defendant and the (Defendant in Error) as plaintiff.

In reply to the contention of plaintiff on page 6 of his brief "that a sufficient answer to such contention is that the demurrers and motions are not in the bill of exceptions and cannot be considered:" Say it is not necessary for the Appellate Court to review the decision of the lower Court on the pleadings, that the pleadings should be embodied in the bill of exceptions. It is sufficient if the pleadings and the rulings

appear upon the Record. The demurrers will be found on pages 69 to 72. The motion to make more definite and certain on pages 64 to and including part of page 67. The motion to strike for duplicity on last part of page 64 and to and part of page 67. The Rulings of the Court on these pleadings will be found in the record at pages 85 and 86, and on page 86 defendant's exception to the rulings of the Court below on these pleadings.

That it is not the law nor practice in Federal Courts to require pleadings and the rulings thereon to be embodied in the bill of exception that the same may be reviewed by the court on writ of error, has been very clearly and definitely settled by this court.

In a very recent case involving this identical question, Mr. Justice Woolverton speaking for this Court, clearly stated the law as follows: The action of the Court in overruling or sustaining a demurrer to the complaint is a matter which appears by the record, and no bill of exceptions is necessary for saving the questions pertaining thereto for the consideration of the Appellate Court. Whenever error is apparent upon the record, it is open to revision, whether it may be made by bill of exceptions or in any other manner (Citing) *Suydam vs. Williamson et al.* 20 Howard 427. And it was specifically held in *Aurora City vs. Welch* 7 Wallace 82, that irrespective of the bill of exceptions, the writ of error brings up for review the decision of the Court below in overruling the demurrer."

Mitsui vs. St. Paul Fire & Marine Ins. Co. 202 Fed. 26. (Advance sheets Fed. Rep. March 27, 1913.)
Moline Plow Co. vs. Webb 141 U. S. 616.

The plaintiff in his brief cites the case of *Phillips vs. Smith*, 96 Pac. 91, to sustain his position that the rules of pleading in Arizona are very liberal and as against a general demurrer every intentment will be made to sustain the pleading. The Supreme Court

of Arizona in this case simply adopted the rule laid down in Pomeroy's Code Pleading (3 Ed. Sec. 549), as the rule on this subject. Neither the decision or Mr. Pomeroy sustains the broad and sweeping rule contended for by the plaintiff, that: "as against a general demurrer every intentment will be made to sustain the pleading." The prevailing rule in the Code States and Federal Courts is: "that it is not the duty of the Court to construe the pleadings more favorable to the pleader than he has himself stated it." *Brown vs. King* 100 Fed. 561-567.

In reply to plaintiff's contention on pp. 10, 11, 12 and 13, that objections and exceptions were not properly taken by defendant to the rulings of the Court we refer to the Record in this case on page 494 as follows:

Mr. McFarland.—We also desire to except to the giving of each one of the instructions requested by the plaintiff and given by the Court, and we desire to except to the refusal of the Court to give each one of the instructions requested by the defendant and refused by the Court. We desire to except to each of these severally. I think beyond that we are not required to go."

"The Court—I think that ought to be sufficient.

Be it further remembered that at the trial of said cause, and before the jury retired to consider their verdict, that the Court granted permission to the defendant to embody into its bill of exceptions, if it should tender one, its objections to the instructions of the Court to the jury more *fully at length* and *in detail*.

The record conclusively shows that defendant at the trial and before the jury retired to consider their verdict did object and duly except to the charge of the Court.

The Record on page 625 shows that on the 2nd day of January 1913 it presented this bill of exceptions and that on said date the same was duly approved by the Court and made a part of the Record.

We respectfully refer the Court to the last three lines at the bottom of page 616, and the first two lines at the top of page 617 of the Printed Record which reads as follows: "The defendant in accordance with the permission of the Court heretofore granted it so to do, as before stated *in this bill of exceptions*, now upon tender of this bill of exceptions states *more fully and in detail* to said instructions," as follows and on pages 617 to and including page 620 objections and exceptions at greater length and more in detail than urged on page 495 of the record, before the jury retired to consider their verdict.

As to the exceptions to the refusal of the Court to give instructions requested by the defendant we refer the Court to that part of the defendant's bill of exceptions Printed Rec. pp. 621-624 and particularly to page 621, which is as follows: "Be it further remembered that at the trial of this cause, and at the proper time and before the jury retired the defendant requested the Court in writing to instruct the jury as follows." The Court is further referred to Printed Rec. pp. 621-624 for exceptions of defendant to the refusal of the Court to give the instructions requested by defendant.

In giving the instructions complained of under defendant's assignment of error numbered 11 and 12 plaintiff confesses error in each of them as will be shown from the following quotation from the record in this case.

"Mr. Seabury.—I respectfully except to the numbered requests submitted by the defendant and charged by the Court. The rules expressly provided that we may except to such matters generally. I now respectfully except to the modification made by the Court of plaintiff's requests number three A in so far as the charge as modified states in substance that if the jury believe that plaintiff was guilty of *wilful negligence* or *gross negligence* that then they must find for the defendant upon the ground that *there is no issue of wilful or gross negligence* on the part of the plain-

tiff in this case, and that the evidence adduced in the case is not susceptible of the inference that the plaintiff was guilty of *gross or wilful negligence* and in that connection we respectfully request your Honor to instruct the jury that there is no such question in this case as *wilful neglect* or want of care on the part of the plaintiff."

In this position of plaintiff by his counsel and for reasons stated we most respectfully concur.

Printed Rec. p. 492.

The authorities cited by the plaintiff in his brief on page 26 and 27 do not sustain his contention that the testimony of Dr. Stark was privileged. The Court of Appeals of New York in the case of *People vs. Austin* 93 N. E. 57, the Court speaking through Mr. Justice Chase, lays down the rule just opposite to that contended for by plaintiff, as follows: "When a physician was sent to a jail by the district attorney to examine the mental and physical condition of a prisoner the *relation* of patient and physician within the Code C. W. Proc. Sec. 834 did not exist and the physician was competent to testify."

The case of *Freel vs. Market Street Cable Ry. Co.* 31 Pac. 70 is along the lines of other cases cited by plaintiff the Supreme Court of California holding that "when a physician was called as a witness by defendant had obtained his knowledge of the case by *prescribing* for plaintiff he was incompetent to testify under Code Civ. Pro. Sec. 1881 of California which provides that a physician cannot without the consent of his patient, testify to any information acquired in *attending the patient*, which was *necessary to enable him to prescribe for her.*"

The case of *Henrencia vs. Guzman* 219 U. S. 44 is not in point for the reason that defendant after the ruling of the Court excluding the evidence stated explicitly just what testimony it expected Dr. Stark to give. The offer and same ruling was made in respect to Doctors Goodrich and Smith.

Printed Rec. first half of pp. 476 and fist half of page 477.

In support of the position of the defendant that the testimony of Dr. Stark was not privileged, we cite the following cases which are directly in point on this subject. *Matter vs. Freeman* 6 Hun. (N. Y.) No. 458.

In *Scripps vs. Foster* 41st Mich. 742 (3 N. W. 216), a physician instituted an action against a newspaper to recover damages caused by the publication of an article to the effect that plaintiff had caused the death of one child and the illness of others by the use of a certain instrument. Several physicians who visited the children stated to have been made ill, were permitted to testify as to their condition. Their testimony was objected to because their knowledge was acquired during visits made as attending physicians.

The Court held that the relation of physician and patient did not exist as no *confidence* was reposed in witnesses, and therefore their testimony was admissible. In *Re Bruendl*, 102 Wis. 45 (78 N. W. 169) it was held that a physician sent by a relative to ascertain the mental condition of a woman, in order that a relative might determine whether or not to apply for guardianship, might testify as to her mental condition.

In *Heath vs. Broadway & R. Co.* 8 N. Y. Supp. 863 physician of Railway Co. visited and examined person injured by alleged negligence of the defendant. Upon seeing such person, physician stated that he came on behalf of the Ry. Co. Held that statements made to him by injured person were not privileged.

Testimony will be admitted, if physician states that the information in question *was not necessary to enable him to treat* a patient. *Halsey's Estate*, 9 N. Y. Supp. 441.

In the case of *James vs. State* 124 Wis. 130 (102 N. W. 320) holds that information acquired in the course of an examination conducted for the purpose of obtaining evidence is not privileged. At the

time the Court excluded the evidence the defendant stated explicitly just what testimony it expected Dr. Stark to give. The offer and same ruling was made in respect to Doctors Goodrich and Smith.

Printed Rec. last half of pp. 476 and first half of page 477.

Ednigton vs. Etna L. Ins. Co. 77 N. Y. 564.

Clark vs. State 61 Pac. 814.

K. C. Ft. S. & M. R. Ry. Co. vs. Murray 40 Pac. 648.

The Court will find from the record of this case as follows:

That the correct doctrine of assumption of risk was raised:

1. By general demurrer.
2. By objection to any evidence.
3. Instruction requested and refused. Rec. pp. 623-625.

On pages 77-79 that the verdict of the jury was returned and the judgment of the Court entered on November 16, 1912. (Rec. pp. 76-78 inclusive.)

That the time of defendant for filing its petition for new trial was by the Court extended forty-two days from November, 28th, 1912. (Rec. pp 96.)

That on the 27th day of December 1912 defendant filed the petition for new trial. (Rec. pp. 98.)

That on January 2nd, 1913 defendant's petition for new trial was by the Court overruled. (Rec. p. 103-104.)

That on March 2nd, 1913, defendant presented its bill of exceptions. *Rec. pp. 107 To 625 inclusive*

That on Nov. 22nd 1912, the Court by its order extended defendant ten day's additional time to prepare and file bill of exceptions. (Rec. pp. 96.)

That within the time allowed defendant by the rules ten days further time was allowed by the Court

to the defendant to prepare its bill of exceptions. (Rec. pp. 624 : : 625.)

That within the time allowed to-wit: December 6th, 1912, defendant presented its bill of exceptions and asked that the same be allowed, filed and made a part of the record.

That on the 2nd day of January, 1913, in the presence of the parties in open Court, this being the day fixed by the Court therefor, the foregoing bill of exceptions is settled and approved by the Court and having been engrossed, now is signed and directed to be filed and made a part of the record. Rec. pp. 625.

That this bill of exceptions was timely made, approved and allowed by the Court below; that objections made and exceptions taken to the several errors set forth in defendant's assignment of errors and embodied in defendant's bill of exceptions. We respectfully submit that the errors assigned and exceptions thereto are now properly before the Court for review. (Rule 76 U. S. C. C. Court Ninth Circuit.)

Hunnicut vs. Peyton 102, U. S. 333.

Mahoning Valley Ry. Co. vs. O'Hara, 196 Fed. 945.

Respectfully submitted,

M. C. M. Farlan

Attorney for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THOMAS W. SYNNOTT, a Creditor, Individually, and
as the Duly Authorized Attorney for, and Agent of
ALEXANDER SEDGWICK and MERRILL K.
GREEN,

Appellant,

vs.

THE TOMBSTONE CONSOLIDATED MINES
COMPANY, LIMITED, Bankrupt, and A. L.
GROW, as Trustee in Bankruptcy of THE TOMB-
STONE CONSOLIDATED MINES COMPANY,
Bankrupt,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Arizona.

FILED

APR 21 1913

United States
Circuit Court of Appeals
For the Ninth Circuit.

THOMAS W. SYNNOTT, a Creditor, Individually, and
as the Duly Authorized Attorney for, and Agent of
ALEXANDER SEDGWICK and MERRILL K.
GREEN,

Appellant,

VS.

THE TOMBSTONE CONSOLIDATED MINES
COMPANY, LIMITED, Bankrupt, and A. L.
GROW, as Trustee in Bankruptcy of THE TOMB-
STONE CONSOLIDATED MINES COMPANY,
Bankrupt,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Arizona.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Appeal Bond of Thomas W. Synnott.....	27
Assignment of Errors by the Creditor and Appellant Herein.. .. .	25
Certificate of Clerk U. S. District Court to Transcript of Record.....	35
Certificate of Referee in Bankruptcy....	5
Citation on Appeal (Copy).....	31
Decision	20
Opinion and Order Approving and Confirming Findings and Order of Referee in Bankruptcy Disallowing Certain Claims.....	20
Order Approving Appeal Bond.....	20
Order Fixing Amount of Bond on Appeal....	19
Order Confirming Acts of Referee in Bankruptcy.....	18
Order of Referee in Bankruptcy Disallowing Claim.....	3
Order of Referee in Bankruptcy Granting Petition for Review.....	4
Order of Submission of Petition for Review....	18
Orders Continuing Hearing of Petition for Review.....	14

Index.	Page
Petition on Appeal of Thos. W. Synnott, a Creditor Herein.	24
Petition to U. S. District Court for Review. . . .	1
Praecipe for Transcript of Record on Appeal. .	33
Praecipe That Certified Copy of Decision be Incorporated in Transcript on Appeal.	34
Proof of Claim of Thomas W. Synnott et al. . .	6
Stipulation That Special Contract Bonds may be Sent up on Appeal.	30
Transcript of the Minute Entries.	14

[Petition to U. S. District Court for Review.]

[2*] *In the District Court of the United States for
the District of Arizona.*

IN BANKRUPTCY—No. 72.

In the Matter of THE TOMBSTONE CONSOLI-
DATED MINES COMPANY, LIMITED,
Bankrupt.

To Daniel McFarland, Esq., Referee in Bankruptcy.

Your petitioners respectfully show:

That your petitioners are creditors of the Tombstone Consolidated Mines Company, Limited, the above-named bankrupt, and that their claim has been disallowed herein.

That on the 8th day of August, 1912, Thomas W. Synnott, of Philadelphia, in the County of Philadelphia, in the District of Pennsylvania, individual, also attorney for and duly authorized agent of Alexander Sedgwick, of New York, State of New York, and Merrill K. Green, of Boston, Commonwealth of Massachusetts, filed in your office, as Referee, a proof of claim against the above-named bankrupt, in favor of Alexander Sedgwick, of New York, State of New York, and Merrill K. Green, of Boston, Commonwealth of Massachusetts, founded upon (461) Special Contract Bonds, of the face value of four hundred thirty-nine thousand and fifty-five dollars (\$439,055.00), with interest thereon from the several dates of the bonds thereto annexed.

That the said claim having been objected to by John Mason [3] Ross, attorney for the Trustee

*Page-number appearing at top of page of original certified Record.

herein, the said claim was by you, as Referee, disallowed. That on the 8th day of August, an order of disallowance, a copy of which is hereto annexed, was by you, as Referee, made and entered herein.

That such order was and is erroneous, in that the said Special Contract Bonds upon which said claim was founded are fixed liabilities of the said bankrupt herein, absolutely owing at the time of the filing of the petition against the said Bankrupt, and that said claim in the amount of said bonds is evidenced by instruments in writing, to wit, the said bonds thereto annexed.

WHEREFORE, your petitioners, feeling aggrieved because of such order, pray that the same may be reviewed as provided in the Bankruptcy Law of 1898 and general order XXVII.

Dated August 24th, 1912.

RICHARDSON & DOAN,
FRANK W. DOAN,

For Petitioners.

State of Arizona,

County of Cochise,—ss.

I, Frank W. Doan, attorney for the petitioners mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true, according to the best of my knowledge, information and belief.

FRANK W. DOAN.

Subscribed and sworn to before me this 24th day of August, A. D. 1912.

My commission expires Feb. 16, 1916.

[4] [Notarial Seal] JOHN DOAN,
Notary Public.

**[Order of Referee in Bankruptcy Disallowing
Claim.]**

*At a Court of Bankruptcy Held in the District Court
of the United States for the District of Arizona.*

At Tombstone, this 8th day of August, A. D. 1912.

IN BANKRUPTCY—No. 72.

In the Matter of THE TOMBSTONE CONSOLI-
DATED MINES COMPANY, LIMITED,
Bankrupt.

Thomas W. Synnott, of Philadelphia, in the County of Philadelphia, in the District of Pennsylvania, individual, also attorney for and duly authorized agent of Alexander Sedgwick, of New York, State of New York, and Merrill K. Green, of Boston, Commonwealth of Massachusetts, having filed in the office of the Referee, a proof of claim against the above-named bankrupt, in favor of Alexander Sedgwick of New York, State of New York, and Merrill K. Green of Boston, Commonwealth of Massachusetts, founded upon (461) Special Contract Bonds, of the face value of Four Hundred Thirty-nine Thousand Fifty-five Dollars (\$439,055.00), together with the interest from the several dates of the bonds hereto annexed.

And said claim having been objected to by John Mason Ross, attorney for the trustee herein, and the objection having come on for a hearing before

me, and due deliberation having been had, and it appearing to me that such Special Contract Bonds, upon which said claim is founded, are only [5] contingent liabilities, and not fixed liabilities, as evidenced by instruments in writing, absolutely owing at the time of the filing of the petition against said bankrupt:

IT IS ORDERED, that said claim be, and the same hereby is, disallowed.

DANIEL McFARLAND,

Referee in Bankruptcy.

**[Order of Referee in Bankruptcy Granting Petition
for Review.]**

ORDER THEREON.

In the United States District Court
for the District of Arizona,—ss.

At Tombstone, in said District, on the 26th day of August, A. D. 1912, on reading the foregoing petition for a review,

IT IS ORDERED, that the same be, and hereby is, granted.

DANIEL McFARLAND,

Referee in Bankruptcy.

[Endorsements]: B-21. In the District Court of the United States for the District of Arizona. In the Matter of the Tombstone Consolidated Mines Company, Ltd., Bankrupt. Petition for Review and Order Thereon Granting Same. Filed at 1 o'clock P. M., August 26th, 1912. Referee in Bankruptcy. Daniel McFarland, Richardson & Doan, Frank W. Doan, Attorneys for Petitioners. Filed Aug. 30, 1912. Allan B. Jaynes, Clerk.

[Certificate of Referee in Bankruptcy.]

[6] *In the District Court of the United States for
the District of Arizona.*

IN BANKRUPTCY—No. 72.

In the Matter of THE TOMBSTONE CONSOLI-
DATED MINES COMPANY, LIMITED,
Bankrupt.

To the Honorable RICHARD E. SLOAN, District
Judge:

I, Daniel McFarland, the Referee in Bankruptcy
in charge of this proceeding, do hereby certify:

That, in the course of such proceeding, an order,
a copy of which is annexed to the petition herein-
after referred to, was made and entered on the 8th
day of August, A. D. 1912;

That on the 26th day of August, A. D. 1912, Mer-
rill K. Green, of Boston, Massachusetts, and Alexan-
der Sedgwick, of New York, State of New York, al-
leged creditors in such proceedings, feeling ag-
grieved thereat, filed a petition for a review, which
was granted;

That a summary of the evidence on which said
order was based is as follows: Documentary, as dis-
closed by Special Contract Bonds herewith handed
up.

That the question presented on this review is, Are
such Special Contract Bonds provable debts in bank-
ruptcy?

I hand up herewith for the information of the
Judge:

1.

Proof of claim.

2.

Special Contract Bonds, upon which said claim is founded.

[7] 3.

Copy of order disallowing said claim.

4.

Petition for review and the order thereon granting same.

Dated at Tombstone, in said District, on the 26th day of August, A. D. 1912.

Respectfully submitted,

DANIEL McFARLAND,

Referee in Bankruptcy.

[Endorsements]: B-21. District Court of the United States for the District of Arizona. In the Matter of the Tombstone Consolidated Mines Company, Ltd., Bankrupt. Certificate on Review. Filed Aug. 30, 1912. Allan B. Jaynes, Clerk.

[Proof of Claim of Thomas W. Synnott et al.]

[8] *In the District Court of the United States for the District of Arizona.*

In the Matter of TOMBSTONE CONSOLIDATED
MINES CO., LTD.,

Bankrupt.

At Rangeley, in the District of Maine, on the 1st day of August, A. D. 1912, came Thomas W. Synnott, of Philadelphia, in the County of Philadelphia, in the District of Pennsylvania, individual, also attorney for and duly authorized agent of Alexander

Sedgwick of New York, State of New York, and Merrill K. Green, of Boston, Commonwealth of Massachusetts, and made oath and says:

That the Tombstone Consolidated Mines Co., Ltd., the person against whom a petition for adjudication in bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the assignors of said Synott, Sedgwick and Green, in the sum of \$439,055 dollars, together with interest from the several dates of the bonds hereto annexed as therein set forth; that the consideration for said debt is as follows: 461 Special Contract Bonds, serial numbers, together with the denominations, are in the schedules hereto annexed marked "A" of said Tombstone Consolidated Mines Co., Ltd. That no part of said debt has been paid; that there are no setoffs or counterclaims to the same; and that the only security held by the deponent or his principals [9] for said debt is the following: Said 461 Special Contract Bonds, which consists of a first lien on all of the assets of said bankrupt estate, subject to the right of other like bondholders to participate in the same. And this deponent further says that this deposition cannot be made by the other claimants in person, because they are not accessible, and that he is duly authorized by his principals to make this affidavit, and it is within his knowledge that the aforesaid debt was incurred, as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

In offering said claim for proof said deponent does so without in any way waiving his security, but insisting on the same.

THOMAS W. SYNNOTT,
Creditor.

Subscribed and sworn to before me this 1st day of August, A. D. 1912.

[Notarial Seal]

H. A. FURBISK,
Notary Public.

A.

SPECIAL CONTRACT BONDS OF THE TOMBSTONE CONSOLIDATED MINES CO., LTD.

Registered Name.	Serials Nos.	Face Value.
Dr. A. E. Abrams	5-671-675	\$5,000
[10] Walter D. Adams	2-1435-1436	200
Gen. F. C. Ainsworth	6-188-189-2563-2567	5,500
Victor Aylward	1	500
Mary A. Bacon	10-1024-1033	1,000
S. H. Bacon	5-1270-1273, 1385	500
Gertrude S. Bailey	8-2621-2628	2,300
Leon O. Bailey	10-949-952, 954-960, 2656, 2682, 2683	11,725
Wendell Bancroft	2-1437, 1438	400
Clinton V. D. Barnes	1-457	500
Henry C. Barnes	5-449, 557, 1511, 1512, 17	3,000
Bayard Barnes	8-	8,000
Lena C. Bassette	1-866	100
C. W. Beatty	2-21, 22	4,750
Albert Beaumont	2-2032, 1937	400
C. A. Benner		200
Francis Bennitt	2-765, 766	1,000

The Tombstone Con. Mines Co., Ltd., et al. 9

Registered Name.	Serials Nos.	Face Value.
Grace A. Bissell	1-2216	500
O. H. Boulee	1-102	100
William A. Brown 2nd.	1-884	50
William S. Browne	1-247	500
George A. Burgess	1-1902	1,000
William Campbell	1-2197	500
Mrs. Annie L. Carrington	1-1941	100
J. B. Carrington,	2-2157, 494	3,000
John B. Carrington,		
Trustee	4-1942-1945	400
[11] Harriet M. Chapman	10-1156-1160, 1260-1264	10,000
Abraham Cochran	5-1853-1857	450
C. C. Cogswell	1-217	500
Elizabeth G. Cole	1-2084	1,000
Mattie A. Cole	1-54,	500
Frank A. Corbin	5-76-78, 1719, 1809	2,300
David Crary, Jr.	1-2217	500
W. H. Curtis, Jr.,	4-1624-1627	1,000
W. F. Darby,	12-467-470, 690, 691, 1574- 1577, 1935, 2386	3,800
Fred W. Doolittle	1-1958	500
Lucilla W. Dye	1-258	500
Kellogg Fairbank		57,000
Frank S. Fay	3-1614-1616	300
George Tod Ford	3-579, 2388, 2392	55,000
Jennie B. Fowler	1-438	100
John H. Francis	1-2205	200
Phillip Godley	5-225-229	5,000
Charles H. Graham	17-2340, 2341, 2557, 2323, 1355-1357, 2242, 2370,	

Registered Name.	Serials Nos.	Face Value.
	2717, 754, 1217, 1529, 1530, 2162, 2163, 2646	23,050
Lucy A. Gordon	4-1003-1006	200
Charles B. Graves	1-375	2,500
Arthur H. Hacker	4-281, 282, 2647, 2648	1,000
E. J. Hall	2-1887, 1888	1,000
[12] James S. Haring	4-1387-1389, 2035	400
Jeanie Henderson	1-2362	3,000
2 Henderson & Co.	2-2360, 2361	7,000
Henry E. Holmes	1-1061	1,000
Ettie L. Howe,	1-2083	1,000
Daniel Hurley	1-2034	500
William Hutton	2-1194, 1558	1,000
C. F. Ingalls	1-1562	500
Samuel J. Kelley	1	500
Belinda Hearn Jouet	2-2657-2665	300
Herman Katz	2-768, 769	200
Edward S. Lacey	2-1572, 1573	2,000
Florence Freeman Land	1-2473	500
Frank Land	4-2469-2472	2,000
G. W. Lemaster	1-207	1,000
Pierce Leshner	1-315	500
Thomas Lloyd	1-117	500
Moses Lyman	2-2290-2294	500
Sarah P. Lyman	5-2289-2291, 2251, 2252	2,700
Stanley McCormick	10-798-807	10,000
The Robert McCurdy Co.	1-19	3,000
Agnes M. McDonough	1-1508	500
J. H. McEwen	1-31	700
F. D. McIntyre	2-584, 1940	1,000
Sarah A. Hanning	1-484	500

The Tombstone Con. Mines Co., Ltd., et al. 11

Registered Name.	Serials Nos.	Face Value.
Genevieve P. Martin	4-447, 2029, 2097, 2402	3,050
John A. Martin	5-1060, 2028, 2303, 2304, 2652	4,500
Martha J. Martin	2-2202, 2203	300
[13] H. William Meiss	1-872	1,000
David B. Mecklejohn	2-146, 147	200
Sarah E. Mecklejohn	1-148	100
J. C. Miller	2-318, 409	200
Sarah Miller	1-2464	100
John P. Mullen	1-1506	500
Myron A. Norris	4-307-309, 444	3,500
Herman Pahren	10-623-627, 699-703	1,000
George E. Painter	1-750	1,000
E. L. Peabody	1-735	100
Don C. Pollard	1-1073	100
C. W. Poster	1-2398	200
J. F. Pratt	1-1089	1,000
Charles L. Pruyn	12-736-745, 2320, 2321	15,000
Sarah T. Pruyn	2-2316, 2317	5,000
Albert E. Rand	6-1191, 2190, 1210, 863, 183, 923	3,000
Mary A. Rand	1-862	50
Ellen M. Rand	1-861	50
W. S. Randall	1-1950	500
James P. Redmond	5-263-267	500
Professor H. C. Reaser	3-1531, 1532, 2101	750
Emil G. Reinert	1-2058	500
Mrs. A. K. Rhoades		2,000
Willis R. Roberts	1-2055	1,000
Montgomery H. Rochester	4-1542, 1543, 2318, 2319	2,000

Registered Name.	Serials Nos.	Face Value.
Professor E. A. Ross	12-1490-1498, 554-556	1,700
[14] William W. Rugg	1-593	500
P. W. Schaaf	1-105	100
Alex Sedgwick		11,000
Henry R. Smith	3-403, 1852, 1224	7,000
Hiram C. Smith	12-2474, 2483, 2329, 2450	10,550
Dr. Marvin Smith	3-1118-1120	300
W. L. L. Spencer	1-451	100
Thomas W. Synnott	43-230, 231, 390, 391, 404, 424, 425, 487, 492, 498, 499, 628, 630, 638, 681, 772, 773, 888-890, 1018, 1213, 1254, 1314, 1341, 1831, 1850, 2086, 2087, 2180, 2192, 2225, 2256, 2260, 2403-2407,	37,500
Mary D. Synnott	1-2728	5,000
John Taylor	1-452	1,000
Frederick Tillinghast	5-2089-2093	5,000
Mrs. Roxanna Tuttle	1-2099	200
Louis D. P. Vail	1-1612	1,000
W. B. Wackerhagen	2-1544, 1545	500
Miss H. P. Wakefield	1-259	500
William P. Walker	1-686	500
Frank A. Wallace	3-2301, 485, 486	2,000
Rose M. Wallace	2-483, 2302	1,500
C. C. Warner	2-1095, 1096	1,000
George E. Weymouth	3-1309, 1400, 1401	250
Ellen E. Wheeler	3-168, 2077, 2078	3,000
Mary D. Whitaker	2-220, 221	200

The Tombstone Con. Mines Co., Ltd., et al. 13

Registered Name.	Serials Nos.	Face Value.
[15] Amos T. White	3-1446, 1775, 1776	1,600
Honorable Peter W. White		5,000
Francis P. White	1-583	100
Lilly May Wiltshire	1-1190	500
William F. Wiltshire	1-1434	500
James C. Whittet	2-500, 501	200
Katherine J. Woodward	1-834	500
Frank Ehlem	3-109-111	3,000
N. B. Dickerman	1-2310	100
Robert K. Porter	1-1726	250
Marion Ward Raymenton	1-2224	200
Charles O. Stone	1-324	500
Lyman W. Winslow	1-269	1,000
Charles Whitcomb	1-388	200
Geoffrey T. Yost	1-689	500
Elizabeth K. White	1-1745	500
Richard Henry Woodnut		1,000
W. W. Curtis		500
Mary E. Dobson		400
Lincoln Brown	12-85, 1325, 50-52, 58, 59, 1249-1253	2,000
Mary M. Curtis	3-353-1135	625
Lura P. Curtis	1-33	425
William D. Curtis	10-887, 2485, 2415, 808, 1587, 1212, 354, 355, 1807, 2229	8,600
[16] Walter G. Graves	1-2265	500
R. W. Kenny	5-1652-1656	2,500
Miriam G. Smith		430
Andrew G. Webster	5-1218-1222	2,500
Sarah W. Pratt	1-2718	600
George W. Walker	7-2365, 2366, 1657-1661,	3,500
A. K. Rhoades	2-459, 1619	2,000

[Endorsements]: B-21. In re Tombstone Consolidated Mines Co., Ltd. Proof of Claim of Thomas W. Synnott et al., Creditor. Filed and disallowed at 11 o'clock A. M., Aug. 8th, A. D. 1912. Daniel McFarland, Referee in Bankruptcy. Geo. R. Blinn and Adams & Blinn, 30 Court Street, Boston. Amos L. Taylor, 30 Court Street, Boston. Filed Aug. 30, 1912. Allan B. Jaynes, Clerk.

[17] IN BANKRUPTCY—No. B-21.

In the Matter of THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.,
Bankrupt.

Transcript of the Minute Entries.

BE IT REMEMBERED that heretofore, to wit, on the ninth day of September, A. D. 1912, the same being one of the regular juridical days of the April, 1912, Term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Orders Continuing Hearing of Petition for Review.]

B-21.

In the Matter of THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.,
Bankrupt.

It is ordered that the hearing of the petition for review herein be continued until Monday, September 16, 1912, at 10:00 o'clock A. M. (1-308.)

AND AFTERWARDS, and upon, to wit, the 16th day of September, A. D. 1912, the same being one of the regular juridical days of the April, 1912, Term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

B-21.

In the Matter of THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.,
Bankrupt.

It is ordered that the hearing of the petition for review herein be continued until Monday, September 23, 1912, at 10:00 [18] o'clock A. M. (1-315.)

AND AFTERWARDS, and upon, to wit, the 23d day of September, A. D. 1912, the same being one of the regular juridical days of the April, 1912, Term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

B-21.

In the Matter of THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.,
Bankrupt.

It is ordered that the hearing of the petition for review herein be continued until Monday, September 30, 1912, at 10:00 o'clock A. M. (1-325.)

AND AFTERWARDS, and upon, to wit, the 30th day of September, A. D. 1912, the same being one of

the regular juridical days of the April, 1912, Term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

B-21.

In the Matter of THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.,
Bankrupt.

It is ordered that the hearing of the petition for review herein be continued until Monday, October 7, 1912, at 10:00 o'clock A. M. (1-335.)

AND AFTERWARDS, and upon, to wit, the 7th day of October, A. D. 1912, the same being one of the regular juridical days of [19] the October, 1912, Term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

B-21.

In the Matter of THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.,
Bankrupt.

It is ordered that the hearing of the petition on review herein be continued until Monday, October 21, 1912, at 10:00 o'clock A. M. (1-371.)

AND AFTERWARDS, and upon, to wit, the 11th day of November, A. D. 1912, the same being one of the regular juridical days of the October, 1912, Term of said court, the following order, *inter alia*, was had

and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

B-21.

In the Matter of THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.,
Bankrupt.

It is ordered that the hearing of the petition for review herein be and the same is now continued until Monday, November 25, 1912, at 9:30 o'clock A. M. (1-590.)

AND AFTERWARDS, and upon, to wit, the 25th day of November, A. D. 1912, the same being one of the regular juridical days of the October, 1912, Term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[20] IN BANKRUPTCY—B—21.

In the Matter of THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.,
Bankrupt.

It is ordered that the petition for review herein be and the same is now continued until Monday, December 23, 1912, at 9:30 o'clock A. M. (2-24.)

AND AFTERWARDS, and upon, to wit, the 23d day of December, A. D. 1912, the same being one of the regular juridical days of the October, 1912, Term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause,

which said order is in words and figures as follows, to wit:

[Order of Submission of Petition for Review.]

B-21.

In the Matter of THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.,

Bankrupt.

By consent of counsel for the respective parties hereto, it is ordered that the petition herein be submitted to the Court on briefs, the brief of the attorneys for the trustee to be filed within five days from this date and the brief of the attorneys for petitioners to be filed within ten days thereafter, and that thereupon said matter shall be taken under advisement by the Court. (2-70.)

AND AFTERWARDS, and upon, to wit, the 17th day of February, A. D. 1913, the same being one of the regular juridical days of the October, 1912, Term of said court, the following order, *inter alia*, was had and entered of record [21] in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Confirming Acts of Referee in Bankruptcy.]

B-21.

In the Matter of THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.,

Bankrupt.

The petition for review herein having been argued and fully submitted at a previous session of the present term of this court and the Court being now fully

advised in the premises, does confirm the acts of the referee in bankruptcy which the petitioners seek to review, in accordance with the written opinion filed herein. (2-138.)

AND AFTERWARDS, and upon, to wit, the 24th day of February, A. D. 1913, the same being one of the regular juridical days of the October, 1912, Term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

B-21.

[Order Fixing Amount of Bond on Appeal.]

In the Matter of THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.,
Bankrupt.

Upon motion of Messrs. Doan & Doan, counsel for Thomas W. Synnott, it is ordered that the bond on appeal of said petitioner be and the same is hereby fixed at the sum of One Thousand Dollars (\$1,000.00). (2-145.)

AND AFTERWARDS, and upon, to wit, the 28th day of February, A. D. 1913, the same being one of the regular juridical days of the October, 1912, Term of said court, the following [22] order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Approving Appeal Bond.]

B-21.

In the Matter of THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.,
Bankrupt.

It is ordered that the appeal bond of Thomas W. Synnott, in the sum of One Thousand Dollars, with the United States Fidelity and Guaranty Company, a corporation, as surety, be and the same is hereby approved. (2-153.)

[Opinion and Order Approving and Confirming Findings and Order of Referee in Bankruptcy Disallowing Certain Claims.]

[23] *In the United States District Court for the District of Arizona.*

B-21.

In Re TOMBSTONE CONSOLIDATED MINES COMPANY, LIMITED.

DECISION UPON CERTAIN APPEALS FROM ORDERS OF THE REFEREE DISALLOWING CERTAIN CLAIMS.

The Referee has certified for review his findings and orders disallowing certain claims presented for allowance against the estate of the above-named bankrupt, based upon what are known as the Special Contract Bonds issued by the said bankrupt company. The Referee found that these bonds did not constitute "a fixed liability as evidenced by a judg-

ment or an instrument in writing absolutely owing at the time of the filing of the petition," and hence were not debts provable in bankruptcy.

The record in the case of each of the disallowed claims presented for review consists of the petition, the order of the Referee, and a copy of the said bonds. The issue of law raised upon the review becomes, therefore, purely one of construction to be given the latter.

It is contended here in behalf of the holders of the bonds that the bonds constitute, if not a lien at law, yet an equitable lien upon the general assets of the company. The soundness of this contention must be determined by the rule of construction, universally applied to such instruments, [24] that the true intent and purport of the contract must be found from a consideration of its provisions as a whole, reading each clause in the light of its context and evident relation to other parts of the instrument. A careful reading and study of the instrument will disclose no provision from which may be inferred an intent to create a general lien on the assets of the mining company as security for its payment. On the contrary, the whole tenor of the instrument is that the lien intended to be created was one that should be limited to the surplus earnings of the company. So long as the company should be a going concern, the right of the holder was restricted to the enforcement of the provisions regarding the disposition of such surplus earnings. The bond was not to mature upon any fixed date nor upon any contingency such as a failure to pay the interest or installment coupons

provided for; only in the event of liquidation or dissolution the bonds were to be preferred as against the stock in any distribution of the surplus assets. It is nowhere even suggested that the rights of creditors of the company to enforce their claims against the company should be subordinated to any lien created by the bond other than such as might arise through the creation out of such surplus earnings of the interest and retirement funds provided for in clause II of the contract. Unless there should be earnings of the company from which these funds should be created and maintained, the rights of holders of these special contract bonds to enforce payment could not arise from a failure [25] on the part of the company to pay either interest or the principal sum. Nor is there anything in clause VII of the contract that may be construed as creating any general lien when read in the light of all the provisions of the contract. Not only this, but in other clauses language is used to make definite and clear the limitation of the lien, first to the surplus earnings agreed to be devoted to the interest and retirement funds, and second, in the event of liquidation or dissolution, to the assets of the company that would otherwise be distributed to the holders of the stock of the company.

As already noted, there is no definite promise of payment of either interest or principal expressed in the bond. The absence of any such promise with the specific and clear provisions in reference to the creation of interest and retirement funds out of surplus earnings and in reference to payment, in the

event of liquidation or dissolution, before anything should be paid the stockholders, are inconsistent with the claim that the holders of the bonds sustained the relation of general creditors of the company at the time the petition was filed or became such by reason of the adjudication. Whether or not they should be held to possess rights and privileges, analogous, in essentials, to those of preferred stockholders, certainly unless a new and different contract from that expressed be read into the bond there is insufficient warrant for holding that the instrument permits the holders of these bonds to assert rights to the prejudice of the general creditors. As I construe the special contract bond, the holder [26] of one is neither a general creditor nor such a lienholder as entitles him to the status of a holder of a provable debt under any clause of Section 63 of the Bankrupt Act.

The findings and orders of the Referee, therefore, disallowing the claims of Richard Garlick and Charles B. Wells, executor of the estate of Thomas H. Wells, deceased, of Alexander Sedgwick, of Thos. W. Synnott, of Merrill K. Green and Alexander Sedgwick, of J. H. Haerr, of W. Lee Kauffman, of George R. Blinn, of F. A. Reilly, of Grace Jewett Seigfried, of Henry B. Favill, of Mary Holmes Garlick, and of Harriet M. Smith, are each of them approved and confirmed.

RICHARD E. SLOAN,

U. S. District Judge.

[Endorsements]: B-21. (35) United States District Court, District of Arizona. Tombstone Con.

Mines Co., Bankrupt. Order Sustaining Referee.
Filed Feb. 17, 1913. Allan B. Jaynes, Clerk. By
Frank E. McCrary, Deputy.

*In the United States District Court for the District
of Arizona.*

No. B-21.

In the Matter of THE TOMBSTONE CONSOLI-
DATED MINES COMPANY, LTD.,
A Bankrupt.

**Petition on Appeal of Thos. W. Synnott, a Creditor
Herein.**

[27] The above-named Thos. W. Synnott, a creditor herein, considering himself aggrieved by the judgment made and entered on the 17th day of February, 1913, in the above-entitled cause, does hereby appeal from such judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

THOS. W. SYNNOTT,
Appellant.

By ADAMS & BLINN,
EHRICK & WHEELER,
DOAN & DOAN,
FLETCHER M. DOAN,
Attorneys for Appellant.

*In the United States District Court for the District
of Arizona.*

No. B-21.

In the Matter of THE TOMBSTONE CONSOL-
DATED MINES COMPANY, LTD.,

A Bankrupt.

**Assignment of Errors by the Creditor and Appellant
Herein.**

Comes now the creditor and appellant herein and says that the decree herein rendered on February 17, 1913, is erroneous and against the just rights of said creditor and appellant in bankruptcy for the following reasons:

The said decision is in error in holding that the bonds in question disclosed no provision from which it may be [28] inferred an intent to create a general lien on the assets of the mining company, the bankrupt herein, as security for the payment of the said bond.

The said decision is in error in holding that the tenor of the said instrument, namely, the bond is that the lien intended to be created thereby is one that should be limited to the surplus earnings of the company, and that the bondholders' rights were restricted to the enforcement and those provisions regarding the disposition of the surplus earnings.

The said decision is in error in holding that the said bonds were only to be preferred as against the stock in a distribution of the surplus assets of the company issuing them in the event of liquidation or dissolution.

The said decision is in error in holding that the special contract bond does not entitle the holder thereof to the standing of either a general creditor or a lienholder so as to entitle him to the status of a holder of a provable debt under section 63 of the Bankrupt Act.

The said decision is in error in approving and confirming the acts of the referee in disallowing the claim filed on said bond upon the theory that the same is not a fixed liability as evidenced by an instrument in writing absolutely owing at the time of the filing of the petition.

The said decision is in error in holding that there is nothing in clause VII of the contract bond that may be properly construed as creating a general lien when read in the light of all the provisions of the contract bond.

[29] Wherefore, the said creditor and appellant herein prays that said order judgment, decree and decision of February 17, 1913, approving and confirming the action of the referee herein and disallowing the claim of the creditor and appellant herein be reversed, and that said Court may be directed to enter a decree overruling and disaffirming the action of the referee.

ADAMS & BLINN,
EHRICK & WHEELER,
DOAN & DOAN,

Attorneys for Appellant.

[Endorsements]: No. B-21. (40.) U. S. District Court, District of Arizona. Tombstone Con. Mines Co., Ltd., Bankrupt. Appeal and Asst. of Errors.

Thos. W. Synnott. Filed Febr. 24, 1913, at 4 P. M.
Allan B. Jaynes, Clerk. By Francis D. Crable,
Deputy.

*In the District Court of the United States for the
District of Arizona.*

IN BANKRUPTCY—No. 72.

No. B-21.

In the Matter of THE TOMBSTONE CONSOLI-
DATED MINES COMPANY, LTD.,

A Bankrupt.

Appeal Bond of Thomas W. Synnott.

KNOW ALL MEN BY THESE PRESENTS:

That we, Thomas W. Synnott, individually, and
[30] Thomas W. Synnott as the duly authorized
attorney and agent of Alexander Sedgwick and Mer-
rill K. Green, as principal, and the United States
Fidelity & Guaranty Company, a corporation, as
sureties, are held and firmly bound unto the Tomb-
stone Consolidated Mines Company, Ltd., in the full
and just sum of one thousand dollars (\$1,000.00), to
be paid to the said Tombstone Consolidated Mines
Company, Ltd., their certain attorneys, agents,
successors or assigns; for which payment, well and
truly to be made, we bond ourselves, our heirs, exec-
utors and administrators, successors and assigns,
jointly and severally by these presents.

Sealed with our seals and dated this 27th day of
February, 1913.

Whereas, lately, at the District Court of the

United States for the District of Arizona, in a suit depending in said court, wherein the Tombstone Consolidated Mines Company, Ltd., is bankrupt, and the said Thomas W. Synnott, individually, and Thomas W. Synnott as the duly authorized attorney and agent of Alexander Sedgwick and Merrill K. Green, was a creditor, a decree was rendered against the said Thomas W. Synnott, individually, and as attorney and agent of said Alexander Sedgwick and Merrill K. Green, and the said Thomas W. Synnott, individually, and as such attorney and agent, having obtained an appeal and filed a copy thereof in the clerk's office of the said court, to reverse the decree in the aforesaid suit and a citation directed to the said Tombstone Consolidated Mines Company, Ltd., citing and admonishing it to be and appear [31] at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco in said Circuit:

Now, the condition of the above obligation is such that if the said Thomas W. Synnott, individually, and as the duly authorized attorney and agent of said Alexander Sedgwick and Merrill K. Green, shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good,

then the above obligation shall be void; else to remain in full force and virtue.

THOMAS W. SYNNOTT.

THOMAS W. SYNNOTT,

Attorney and Agent for Alexander Sedgwick and
Merrill K. Green.

UNITED STATES FIDELITY & GUAR-
ANTY CO.

[Corporate Seal]

By ALFRED C. LOCKWOOD,

Its Attorney in Fact.

Scaled and delivered in the presence of

A. SMITH.

A. Y. WRIGHT.

State of Arizona,

County of Cochise,—ss.

Before me, A. Y. Wright, a notary public in and for the county and State aforesaid, on this day personally appeared Alfred C. Lockwood, known to me to be the person whose name is subscribed to the foregoing instrument as the attorney in fact of the United States Fidelity & Guaranty Company, [32] a corporation, and acknowledged to me that he signed the name of the United States Fidelity & Guaranty Company thereto as principal, and his own name thereto as attorney in fact, and that as such attorney in fact he executed the same for the purpose and consideration therein expressed as the free act and deed of the said corporation, and by him voluntarily executed, and in accordance with the direction of the executive officers of said corporation.

Given under my hand and seal of office this 27th day of February, 1913.

[Notarial Seal]

A. Y. WRIGHT,
Notary Public.

My commission expires February 16, 1916.

[Endorsements]: In Bankruptcy—#72. No. B-21. (47.) United States District Court for the District of Arizona. In the Matter of the Tombstone Consolidated Mines Company, Ltd., a Bankrupt. Appeal Bond of Thomas W. Synnott. Doan and Doan, Attorneys for Creditor. Filed February 28, 1913. Allan B. Jaynes, Clerk.

[33] *In the United States District Court for the District of Arizona.*

No. B-21.

IN BANKRUPTCY—No. 72.

In the Matter of THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.

Stipulation [That Special Contract Bonds may be Sent Up on Appeal].

It is hereby stipulated and agreed between the attorneys for appellant and the attorneys for appellee that the Special Contract Bond herein, the instrument on which the claim was filed, may be, by the Clerk of the United States District Court for the District of Arizona, sent up on appeal with the other

papers herein so as to obviate the necessity of making a complete copy thereof.

Dated March 4, 1913.

EHRIK & WHEELER,
ADAMS & BLINN, .
DOAN & DOAN,
FLETCHER M. DOAN,
Attorneys for Appellant.
ELLINWOOD & ROSS,
Attorneys for Appellee.

[Endorsements]: B-21. 50. U. S. District Court, District of Arizona. Tombstone Consolidated Mines Co., Ltd., Bankrupt. Stipulation. Doan and Doan, Attorneys for Appellant, Douglas, Arizona. Filed Mar. 13, 1913. Allan B. Jaynes, Clerk.

[Citation on Appeal (Copy).]

[34] *In the United States District Court for the District of Arizona.*

No. B-21.

IN BANKRUPTCY.

In the Matter of TOMBSTONE CONSOLIDATED
MINES COMPANY, LTD.,

Bankrupt.

United States of America,—ss.

The President of the United States of America to
Tombstone Consolidated Mines Company, Ltd.,
and A. L. Grow, Trustee of Tombstone Consoli-
dated Mines Company, Ltd., Bankrupt.

You and each of you are hereby cited and admon-

ished to appear in the United States Circuit Court of Appeals for the Ninth Judicial Circuit within thirty (30) days from the date of this writ, pursuant to the appeal duly obtained and filed in the Clerk's office of the United States District Court for the District of Arizona, wherein you are appellees and Thomas W. Synnott is the appellant, to show cause, if any there be, why the order and decree in said appeal mentioned should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf, and to do and receive *that* may appertain to justice to be done in the premises.

Witness, The Honorable RICHARD E. SLOAN, United States Judge for the District of Arizona, this 3d day of March, 1913.

RICHARD E. SLOAN,
Judge.

[35] Service of the within Citation accepted on behalf of the Tombstone Consolidated Mines Company, Ltd., a Bankrupt, this 5th day of March, 1913.

ELLINWOOD & ROSS,
Attorneys for A. L. Grow, Trustee.

[Endorsements]: No. B-21. (51.) United States District Court for the District of Arizona. In the Matter of the Tombstone Consolidated Mines Company, Ltd., a Bankrupt. Citation. Filed Mar. 13, 1913. Allan B. Jaynes, Clerk.

[36] *In the United States District Court for the
District of Arizona.*

No. B-21.

IN BANKRUPTCY—No. 72.

In the Matter of THE TOMBSTONE CONSOLI-
DATED MINES COMPANY, LTD.,
A Bankrupt.

Praeceptum [for Transcript of Record on Appeal].

Clerk of the United States District Court:

In preparing the transcript on appeal in this case, you will include therein the Petition and Proof of Claim, the Certificate of Review, all orders or entries made by the Referee in Bankruptcy as they appear in your court, all minute entries, all orders of the Court, and particularly the order of the Court confirming the action of the Referee, set forth in full, the Petition on Appeal, Assignment of Errors, Bond and Citation. You will omit making a copy of the Special Contract Bond unless we notify you by additional direction, as we expect to have signed the stipulation that you may send up the original bond.

EHRICK & WHEELER,
ADAMS & BLINN,
DOAN & DOAN,
FLETCHER M. DOAN,

Attorneys for Appellant.

[Endorsements]: No. B-21. (49.) United States District Court, for the District of Arizona. [37]
In the Matter of the Tombstone Consolidated Mines

Company, Ltd., a Bankrupt. Praecept. Doan & Doan, Attorneys for Appellant. Filed March 6, 1913. Allan B. Jaynes, Clerk of the Court.

In the United States District Court for the District of Arizona.

In the Matter of THE TOMBSTONE CONSOLIDATED MINES COMPANY, LIMITED,
A Bankrupt.

Praecept [That Certified Copy of Decision be Incorporated in Transcript on Appeal].

Mr. Allan B. Jaynes, Clerk of said Court.

Please incorporate in the transcript on appeal herein to the Circuit Court of Appeals a certified copy of the decision of this Honorable Court upon which the order herein appealed from was entered.

Respectfully,

ELLINWOOD & ROSS,
Attorneys for A. L. Grow, Trustee.

[Endorsements]: B-21. (52.) In the United States District Court for the District of Arizona. In the Matter of the Tombstone Consolidated Mines Company, Ltd., a Bankrupt. Praecept. Filed March 20, 1913. Allan B. Jaynes, Clerk.

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the United States District Court for the District
of Arizona.*

No. B-21.

In the Matter of THE TOMBSTONE CONSOLI-
DATED MINES COMPANY, LTD.,
Bankrupt.

United States of America,
District of Arizona,—ss.

I, Allan B. Jaynes, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages, numbered 1 to 37, inclusive, together with the 461 special contract bonds, being petitioner's exhibits herein, constitute and are a true, complete and correct copy of the record, pleadings, and all proceedings had in said action as the same remain on file and of record in said District Court. I also annex the original citation in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of \$22.90, and that the same has been paid in full by the appellant, Thomas W. Synnott.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona at Phoenix, in said District, this 21st day of March, in the year of our Lord one thousand nine hundred and thirteen,

and of the Independence of the United States of America the one hundred and thirty-seventh.

[Seal]

ALLAN B. JAYNES,

Clerk United States District Court, District of Arizona.

[Endorsed]: No. 2263. United States Circuit Court of Appeals for the Ninth Circuit. Thomas W. Synnott, a Creditor, Individually, and as the Duly Authorized Attorney for and Agent of Alexander Sedgwick and Merrill K. Green, Appellant, vs. The Tombstone Consolidated Mines Company, Limited, Bankrupt, and A. L. Grow, as Trustee in Bankruptcy of The Tombstone Consolidated Mines Company, Bankrupt, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Received March 31, 1913.

F. D. MONCKTON,

Clerk.

Filed April 2, 1913.

F. D. MONCKTON,

Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THOMAS W. SYNNOTT, a Creditor, Individually, and
as the Duly Authorized Attorney for, and Agent of
ALEXANDER SEDGWICK and MERRILL K.
GREEN,

Appellant,

VS.

THE TOMBSTONE CONSOLIDATED MINES
COMPANY, LIMITED, Bankrupt, and A. L.
GROW, as Trustee in Bankruptcy of THE TOMB-
STONE CONSOLIDATED MINES COMPANY,
Bankrupt,

Appellees.

Brief of Appellant.

ADAMS & BLINN,
AMOS L. TAYLOR,
DOAN & DOAN,

Counsel for Appellant.

INDEX TO APPELLANT'S BRIEF.

	PAGE
Statement of Proceedings below	1
Statement of Case	2
Specification of Errors	7
The Issues raised	7
Argument	8

I.

The bonds are provable claims	8
1. The Bankruptcy Act governs	8
2. Debt owing absolutely	9
3. Debt provable as consequence of bank- ruptcy	9
4. Provable debt	13
5. As to form of proof under rules	13
6. Rule apart from bankruptcy	13
7. Equitable claims are provable	14
8. Income bonds are provable	15
9. As to liquidation or dissolution	16
10. Net earnings not requisite	17
11. Consideration need not be alleged	18
12. Form or sufficiency not now open	19
13. Conclusions	20

II.

The bonds constitute preferred claims	21
1. Entire transaction to be considered.	21
2. Terms of the bonds	21

	PAGE
3. Equitable liens	23
4. Bondholders not stockholders	24
5. Bonds duly recorded	25
6. Trustee stands in the shoes of the bank- rupt	25
7. Generally as to proof of secured claims .	26
8. Interpretation of these bonds	27
9. Conclusions	32

III.

If the bonds are ambiguous, oral evidence is ad- missible to explain them	32
1. Such evidence should be received in this case	33
2. The request to introduce such evidence was made below	34
3. Outline of such evidence	36
4. Doctrine of estoppel applies here . . .	37
5. Conclusion	38

APPENDIX.

Copy of Bill in Equity to Enforce Lien under these Bonds	40
Copy of Contract to Sell these Bonds	51
Copy of Form of Bond	59
Schedule of Real Estate belonging to Bankrupt .	71
Schedule of Personal Property belonging to Bank- rupt	79

**In the United States Circuit Court of Appeals
for the Ninth Circuit.**

Number 2263.

THOMAS W. SYNNOTT, PETITIONER, *Appellant*

vs.

THE TOMBSTONE CONSOLIDATED MINES
COMPANY, LTD., ET AL., *Appellees.*

BRIEF FOR THOMAS W. SYNNOTT, APPELLANT.

STATEMENT OF PROCEEDINGS BELOW.

This is an appeal from the decree entered by the United States District Court for the District of Arizona on February 17, 1913 (Record, pp. 18, 19), confirming the order of the Referee in Bankruptcy disallowing the claims of this appellant to be allowed to prove as secured claims certain bonds issued by The Tombstone Consolidated Mines Company, Ltd., as more fully hereinafter appears. The petition for proof of these claims appears on pages 6 to 14, inclusive, of the record. The order of the Referee disallowing these claims appears on pages 3 and 4 of the record, and the petitioner's petition for review of said order by the said District Court appears on pages 1 and 2 of the record. The petition for proof of claim was brought

by the said Thomas W. Synnott for himself and as attorney for, and duly authorized agent of, Alexander Sedgwick and Merrill K. Green, the three constituting a committee to whom had been assigned all the bonds set out in the petition.

A petition for review was filed by the said appellant, asking the United States District Court for the District of Arizona to review the decision of the Referee pursuant to the Bankruptcy Act (Record, pp. 1 and 2), which was duly granted by the Referee (Record, p. 4). The District Court has entered a decree affirming the order of the Referee disallowing the said bonds (Record, pp. 18 and 19), and the Judge of the said District Court rendered a written opinion, stating his reasons therefor (Record, pp. 20-23, inclusive).

STATEMENT OF THE CASE.

The Tombstone Consolidated Mines Company, Ltd., was a corporation organized under the laws of the then territory of Arizona, and on August 10, 1911, was duly adjudicated a bankrupt in the District Court of the Second Judicial District of the then territory of Arizona (acting as a court of bankruptcy) upon an involuntary petition against it by certain of its creditors filed in said Court on July 18, 1911. On August 10, 1911, the said case was duly referred by said Court to Daniel McFarland, Esq., Referee in Bankruptcy, and A. L. Grow was on September 2, 1911, appointed Trustee of the property of said bankrupt.

The appellant here seeks to prove against the said bankrupt corporation, and have allowed as secured

claims, 461 Special-Contract-Bonds aggregating \$439,055, with interest, issued by said bankrupt, a copy of one of which is set out in the appendix hereof.

It appears that on July 16, 1901, the bankrupt entered into a contract with The Development Company of America, a corporation organized under the laws of Delaware with office at New York, N. Y., to raise large sums of money for the bankrupt to enable it to purchase and carry on its business, and that a second contract was entered into between these parties on December 14, 1901, to carry out that purpose, providing for a bond issue of \$3,000,000 (being the bonds in question), for the record of the agreement and the copy of the bonds, and that the contract should bind and be for the benefit of the successors and assigns of the parties and should extend to and benefit the holders of any such bonds as assignees of said The Development Company. This contract and copy of bonds were duly filed and recorded on January 22, 1902, in the office of the County Recorder for the County of Cochise, in the State of Arizona, in book 6 of Miscellaneous Records at pages 45-62, inclusive. A copy of said contract and bond appears in the appendix hereof.

On the face of each bond there is a straight promise to pay the par value of the bond in gold coin, etc., at its face value, payable in twenty equal installments, represented by the coupons attached, "from and out of a retirement fund created from the net surplus earnings of the company as hereinafter stipulated at the times and upon the terms and conditions hereinafter stated, but not otherwise; also that the company

agrees to pay to the registered holder hereof, in like gold coin, from an interest fund created from the net surplus earnings of the company, as hereinafter stipulated and not otherwise, interest on the face value" at the rate of six per cent. in semi-annual payments. The bond then goes on to provide for place of payment, for the registration of the bond and its transferability. It then states, "Be it further known that the terms and conditions governing the payment of this bond and the payment of the installment coupons hereto attached and the interest thereon are endorsed on the back hereof and are hereby expressly made a part of this Agreement, as much so as if they were fully written on the face of this Bond."

On the back of the Bond, under the heading "TERMS AND PRIVILEGES OF SPECIAL-CONTRACT-BOND," there appear numerous provisions and stipulations:—

First. That the proceeds derived from the sale of the bonds shall be held and used for the purchase of property, real and personal, or a railway company, mining machinery, etc., the object being to provide a plant and working equipment.

Second. That out of the earnings of the company there shall be set aside an "Operating Fund" to carry on the business, an "Interest Fund" to pay interest on the bonds, and a "Retirement Fund" to be used to pay off the bonds as the various ones become due and payable.

Third. That the earnings of the company shall be applied, first to current expenses, next to installments of interest on the bonds in question, next to payment of dividends on stock of the company if the directors

so order, not exceeding four per cent., and all remaining earnings shall be transferred to the "Retirement Fund" to take up the coupons as above.

Fourth. That the company has a right to retire all bonds on any interest day by paying the face value with all accrued and unpaid interest.

Fifth. "In the event of liquidation or dissolution of the Company, all Bonds outstanding and unpaid shall be paid in full, both as to principal and accrued interest thereon, at the rate of six per centum per annum, before any distribution is made of any of the assets of the Company to the holders of the stock of the Company."

Sixth. "It is further agreed that the Company will not execute, sign or deliver any Mortgage, Deed of Trust, Conveyance, Lease, Release or Waiver, or other instrument which shall, subject to the terms and conditions of this Agreement, be prior to or in any way give a preference as against or over the rights of the holder of this Bond or of any other Bond of like issue."

Seventh. "It is expressly agreed and understood by the holder of this bond that the obligation hereby created is solely against the Company as such, and is only against the Retirement Fund created from the surplus earnings of the Company, as hereinbefore stipulated. Provided that in the event of liquidation or dissolution of the Company, the obligations of this Bond shall immediately extend and attach to all the Funds and other assets of the Company whatsoever, as in Clause V of this instrument, above stipulated and set forth. The Company further covenants and

agrees that the total bonds of this issue outstanding at any time and as a unit shall be deemed and taken, subject to and in accordance with the conditions hereinbefore set forth, to control the title to all the property of the Company, real and personal, and of every kind and nature, and for the enforcement thereof the Company hereby declares and acknowledges that it holds all its rights, interests, or title in and to any and all real and personal property, of every kind and nature whatsoever, now held or which may be hereafter acquired by it, subject to and in accordance with the aforesaid conditions, and that the Company has caused a copy of this special contract bond to be duly filed and recorded in the County of Cochise, Territory of Arizona, in which the properties of the Company are situate."

The Referee disallowed all these bonds as claims against the bankrupt on the ground as stated in the order that they "are only contingent liabilities and not fixed liabilities, evidenced by instruments in writing, absolutely owing at the time of the filing of the petition against said bankrupt" (Record, pp. 3 and 4). Apparently, he did not pass upon the question as to whether they were secured claims or not, basing his decision solely on the language quoted. The Judge of the District Court affirmed this order, and went further, holding in his opinion that said bonds did not constitute a lien upon the assets of said corporation (Record, pp. 20-23, inc.).

SPECIFICATION OF ERRORS.

The errors assigned (Record, pp. 25, 26) are in substance that the Court below erred in ruling:

1. That the bonds disclose no provision from which an intent to create a general lien may be inferred.

2. That the lien created by the bonds is limited to the surplus earnings of the bankrupt.

3. That the bonds were to be preferred only as against the stock in distribution of assets of the bankrupt.

4. That the bondholders are not entitled to the standing either of a general creditor or a lien holder under Section 63 of the Bankruptcy Act.

5. That the bonds do not constitute a fixed liability absolutely owing at the time of filing the bankruptcy petition.

6. That there is nothing in the seventh clause of the bonds, taken together with all the provisions of the bonds, which creates a general lien.

THE ISSUES RAISED.

The questions raised here may be for convenience, and except as hereinafter otherwise treated, grouped under three main headings:

I. Are these bonds provable in bankruptcy in this case?

II. If they are provable, are they secured or unsecured claims?

III. If the Court finds that the bonds in question are ambiguous and the real intention of the parties cannot be ascertained from the instruments themselves for that reason, extrinsic evidence should be offered to show the intention of the parties, their relations, and an opportunity to offer such evidence should be given.

ARGUMENT.

I.

The appellant contends that these bonds constitute provable claims in bankruptcy in this case.

1. The Bankruptcy Act Governs.

The law governing this question is found in Section 63 of the United States Bankruptcy Act, the material parts of which are as follows:

Section 63 (a): "Debts of the bankrupt may be proved and allowed against his estate which are

(1) A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (4) founded upon an open account, or upon a contract, express or implied.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in

such manner as it shall direct, and may thereafter be proved and allowed against his estate."

2. Debt Owing Absolutely.

It is apparent that the debt must be one fixed and owing absolutely at the time when the petition was filed, and everything is considered as of that date.

See Collier on Bankruptcy, p. 853.

See *County Commissioners v. Hurley*, 169 Fed. 92.

"On that date the property of the bankrupt passes from his control to the court or its receiver and thence to the trustee. . . . Indeed the conditions at the time of the filing of the petition measures the extent of the estate and the rights of all creditors of the bankrupt and all parties interested in the property."

3. Debt Provable as Consequence of Bankruptcy.

"It is equally well settled, however, that a claim which was not due prior to the filing of this petition may become provable as a consequence of the filing of the petition. In such cases the debt and bankruptcy are coincident."

Loveland on Bankruptcy, Vol. 1, p. 598.

A breach of contract may result from the filing of the petition, and in such a case the claim for damages ripens simultaneously with the filing of the petition.

Collier on Bankruptcy, p. 854.

In Re Swift, 112 Fed. 315.

The bankrupts were stock brokers at Boston, Mass. They made an assignment for the benefit of their creditors, and were later adjudged bankrupts. The petitioner was their customer, and presented a proof of claim for balance due him on the account less value of stocks which he received back. The trustee contended that the account should be stated as of the time of the assignment. The bankrupt had agreed to deliver certain stocks to the petitioner upon the payment of the balance due. On appeal from the District Court it was decided by Putnam, J., that neither party fulfilled the ordinary conditions, neither made a demand or tender. Consequently, according to the ordinary rules of law no cause of action arose in favor of either party against the other. The position is one, therefore, to be solved by the law itself. The simple rule based on fundamental principles and traceable in the text-writers and decisions of the Courts for fully a century must be applied, to the effect that, "where a man has disabled himself from performing his contract, it is unnecessary to make any request or demand for performance." . . . It is maintained that, unless the voluntary assignment operated to ripen the claim, it was not ripened in season to become provable.

With reference to statutes on bankruptcy there are contingent demands and also engagements of such character that it remains uncertain whether they will give rise to an actual liability as to which there are no means of removing or valuing the uncertainty by any calculation. We have already seen that proceedings in bankruptcy rendered unnecessary a demand

and tender, and we must hold that this proof of debt relates to the time when they were commenced. From that time the stock in question was beyond the power of the stock brokers to deliver effectually. The contract ripened simultaneously with the beginning of the proceedings in bankruptcy as the consequence thereof in connection with the adjudication which followed. Of course, as everything related back to the filing of the petition, the ripening of the claim did not occur before it was filed, nor afterwards, but simultaneously with it, as already said. Consequently, by necessary effect there was created and existed, when the proceedings commenced, a provable claim.

In Re Pettingill & Company, 137 Fed. 143.

On page 146, Lowell, Circuit J., said, "For admission to proof, however, the claim need not arise before bankruptcy, nor need the contract be broken theretofore. It is sufficient for proof if the breach of contract and bankruptcy are coincident. To some extent bankruptcy operates as a breach of the bankrupt's contract . . . where the creditor by seeking to prove, manifests his election to treat the contract as broken. The Court on bankruptcy may permit claims arising from such breach of contract which breach did not occur before bankruptcy but was caused constructively by the adjudication of bankruptcy itself. . . . It seems, therefore, that the text of provability under the Act of 1898 may be stated thus, If the bankrupt at the time of bankruptcy by disenabling himself from performing the contract in question and by repudiating his obligations could give the right to maintain, at once, a suit

in which damages could be assessed at law or in equity, then the creditor could prove in bankruptcy on the ground that bankruptcy is the equivalent of disabling and repudiation." This was a guarantee of dividends on stock of a corporation, and it was held that future dividends not yet due were contingent liability.

In Re Neff, 157 Fed. 57.

The bankrupt made a promissory note payable at a time and place certain upon the surrender of certain stock. It was contended that this was not a provable claim, as it was made conditional upon the surrender of the stock at a future time, and was optional with the holder.

Lurton, Circuit J., held that the bankruptcy proceedings amounted to an out-and-out repudiation of the contract, and that it is sufficient if the claim becomes provable as a consequence of bankruptcy. The creditor by offering to file his proof manifests his election to treat the contract as broken.

In Re National Wire Corp., 166 Fed. 631.

In Re Duquesne Incandescent Light Company,
176 Fed. 785.

This was a contract to furnish burners at the rate of 35,000 per month from June to November, with 40,000 more in December. The referee disallowed the claim.

Young, District J. Pa., overruled the referee, and allowed the claim on the ground that the filing of the petition in bankruptcy constituted a breach of the contract. This made the claim provable, although

unliquidated, and the parties submitted themselves and the referee liquidated it.

In Re National Wire Corp., 166 Fed. 631.

4. Provable Debt.

The term "provable debt" does not necessarily mean allowable debt, since there may be some bar or other reason which will appear at the trial to defeat the merits of the claim.

Collier on Bankruptcy, p. 853.

5. As to Form of Proof under Rules.

The fact that the proof of claim in the form as required by the rules of the Supreme Court of the United States states that the debt existed "at and before filing of the petition for adjudication of bankruptcy" of debts should not change this result, since the word "and" must be construed to mean either "or" or "and," as the facts may require.

Collier on Bankruptcy, p. 855.

In Re Swift, 112 Fed. 315.

6. Rule Apart from Bankruptcy.

Entirely apart from bankruptcy proceedings, it has been repeatedly held that, where one party to an executory contract prevents the performance of it or puts it out of his own power to perform it, the other party may regard it as terminated and demand what damages he has sustained thereby.

Lovell v. St. Louis Mutual Life Insurance Company, 111 U. S. 264.

This was a case where the policy provided that upon default of payment of premium the policy should not default, but the insured should have paid up value upon certain notices, etc. The company transferred all its assets to a new company, and Bradley, J., held that the insured had a right to consider this a determination of the contract immediately.

Ruehm v. Harst, 178 U. S. 1.

This was a contract for 100 bales of hops to be delivered 20 each month by a partnership. There was notice of dissolution, and it was held that after a notice of a renunciation of a continuing agreement the party is at liberty to consider himself absolved from any future performance, retaining his right to sue, which he may do immediately. "It is not disputed that if one party to the contract has destroyed the subject matter or disabled himself so as to make performance impossible, his conduct is equivalent to a breach although the time for performance has not arrived."

See also *Newcomb v. Brackett*, 16 Mass. 161, at 166.

7. Equitable Claims are Provable.

The debt to be provable need not be an action at law, as any equitable claim is sufficient and equitable principles govern courts of bankruptcy.

Collier on Bankruptcy, p. 855.

Loveland on Bankruptcy, p. 603.

In Re James, 131 Fed. 401,

where Putnam, Circuit J., held that a wife might recover a loan of the bankrupt, who was her husband,

without regard to its enforceability under the laws of the State, since the contract was a valid one in equity, by the principles of which Courts of Bankruptcy are governed.

In Re Peasley, 137 Fed. 190.

The creditor took a bond for a deed, then paid the full amount of the purchase price. No deed was given, and the vendor went into bankruptcy. The purchaser now seeks to have established a lien, and it was held by Aldrich, District Judge, to constitute an equitable lien. "The money was advanced by the vendee in reliance upon the bond. There is no question made against the proposition, and, whether it safeguarded the vendee's interest or not, he attempted to give notice of his interest to the world by having his bond recorded, and performance under the contract was suspended by the arm of the bankruptcy law." A resulting lien may exist from trust interests as may arise or result by implications of law.

8. Income Bonds are Provable.

Hence it is seen from the foregoing that the bondholders would have a valid, provable claim in this case, although the bond simply provided that the same was to be paid from income, namely, if the fifth, sixth, and seventh paragraphs did not appear at all, since by the filing of the petition in bankruptcy and the subsequent adjudication the bankrupt rendered it impossible for it to carry out the terms of the bonds, that is, to make any further income. On this ground

alone the petitioners ask that the claims be allowed as provable.

9. As to Liquidation or Dissolution.

But the petitioners do not have to rely solely upon the above doctrine because the bonds themselves expressly contain further provisions about when they shall become payable. The fifth paragraph on the back of the bonds expressly states that "in the event of liquidation or dissolution of the company all bonds" with interest shall be paid before any distribution.

It, therefore, becomes of interest to ascertain a meaning of the word "liquidation."

In *Midgett v. Watson*, 29 N. Carolina, 143, at 145, it was held that "liquidation" "is the act of settling, adjusting debts, or ascertaining their amounts or balance due . . . to liquidate an account is to ascertain the balance due, to whom due and to whom payable."

In *L. D. Garrett Company v. Murton*, 71 N. Y. Sup. 17, at page 19, it was held "in a general sense liquidation means the act or operation of winding up the affairs of the firm or company by getting in the assets, settling with its debtors and creditors, and appropriating the amount of profit or loss."

In *Burr v. Williams*, 20 Ark. 171, it was held that the words "in liquidation" written on a partnership note meant that the firm was dissolved.

In *Richmond v. Irone*, 121 U. S. 27, it was held that the ordinary sense of liquidation is "to clear away."

With reference to the meaning of the word "dissolution" it has been held that the mere insolvency of a

corporation followed by a cessation of business with no intent to resume will not operate what is technically known as dissolution, but that such a condition of affairs will confer upon creditors practically the same rights as they would have under technical dissolution.

*Lyons-Thomas Hardware Company v. Perry
Stove Manufacturing Company, 86 Texas,
143.*

This is exactly the situation in this case. What took place in so far as the rights of creditors are concerned, including these bondholders, fixes and determines the rights of all parties just as much as if there had been a technical dissolution upon the day of filing the petition.

10. Net Earnings not Requisite.

There is no occasion for an allegation in this proof that there were net earnings of the company which became applicable to pay the bonds in question, because by the adjudication in bankruptcy all obligations under the bonds were repudiated, and they became at once payable, as above seen. The cases cited in behalf of the trustee of said bankrupt are not in point.

*Morse v. Bay City Gas Company, 91 Fed.
938,*

was a suit in equity upon the bonds, and not a bankruptcy case at all. This case is significant upon the way equitable claims of this nature will be handled.

Likewise

*Edwards v. Bay City Gas Company, 91
Fed. 946,*

is a bill in equity for an accounting, and not a bankruptcy proceeding at all.

11. Consideration Need not be Alleged.

It had been argued in behalf of the trustee that the proof of claim here is insufficient, since the consideration paid for the bonds is not set out in full. On this point see

Loveland, Vol. 1, p. 693, 4th ed., as follows:

“The proof of a debt evidenced by a promissory note which is attached as an exhibit is a sufficient compliance with the statute with respect to stating the consideration for the debt. A promissory note is *prima facie* evidence of consideration and an instrument under seal always imports a consideration.”

Hayes v. Kile, 8 Allen, 300.

Perley v. Perley, 144 Mass. 104, at 107.

And again on page 694:

“The holder of a promissory note or other negotiable paper who took it for value in good faith before maturity thereof need not state the consideration which he gave for it.”

In the case of *Baumhauer v. Austin*, 186 Fed. 260, the consideration alleged in the proof of claim was

“money loaned and advanced by the deponent at diverse times to said bankrupt evidenced by a certain promissory note executed and delivered to

this deponent . . . said note is hereto attached and filed herewith."

This was held to be a good proof.

12. Form or Sufficiency of Proof not now Open.

If it should be held that the proof of this appellant is not sufficient because the consideration is not set out or for any other defect in form, then the petitioners hereby request leave to amend their proof to make the necessary allegations as to the consideration for each bond. Sufficient time should be allowed for this, as there are a large number of bondholders to be consulted, and the facts ascertained as to each bond.

On the question of amendment see

Loveland, p. 694, *supra*.

In Re Stevens, 107 Fed. 243.

In Re Stevens, 104 Fed. 325.

However, the appellant here contends that the question of the sufficiency of this proof of claim as to form is not now open to the trustee, as it was not raised before the Referee, and the Referee's decision as contained in his order expressly states that the claims were disallowed as being contingent liabilities and not provable in bankruptcy (Record, pp. 3 and 4). Likewise this question was not passed upon by the Judge of the District Court.

13. Conclusions.

Our general conclusions, therefore, on this branch of the question are:

a. That this debt became due and payable simultaneously with the filing of the petition in bankruptcy.

b. That the filing of the petition in bankruptcy rendered it impossible for the bankrupt thereafter to fulfill its obligations under the bonds, and legally amounted to a repudiation of such obligations.

c. That such repudiation immediately gave the bondholders the right to bring suit upon the bonds and to have its damages assessed.

d. That such damages must be the face value of the bond with unpaid interest.

e. That the bonds themselves provide that in the event of liquidation or dissolution the bonds shall be paid before distribution, and this makes these bonds doubly provable.

f. That if the bonds had simply provided that they should be paid out of the earnings, without any lien or any right to share in distribution, they would be provable as unsecured claims.

g. Any questions as to the form or sufficiency of the proof of claim is not now open to the Trustee in Bankruptcy.

CONSEQUENTLY THESE BONDS ARE PROVABLE CLAIMS, AND MUST BE ALLOWED EITHER AS UNSECURED CLAIMS OR AS SECURED CLAIMS.

II.

The appellant contends that these bondholders have ~~preferred~~ ^{secured} claims, and that the bonds must be allowed as such and paid before the general creditors are entitled to anything.

1. Entire Transaction to be Considered.

It is elementary that Courts of Equity will examine the entire transaction and ascertain what the parties really intended to do, and we should apply that rule to these bonds. They are elaborate in their nature and contain a great many provisions which would be entirely unnecessary if the bonds were simply to be paid from earnings without any lien, and the fact that these unnecessary provisions appear must be given great weight.

2. Terms of the Bonds.

The fifth clause on the back expressly states that the bonds are to be paid in full in the event of liquidation or dissolution before anything is paid to the stockholders. Then by the sixth clause it is agreed that the company shall not execute any Mortgage, Deed of Trust, Conveyance, Lease, Release or Waiver or Other Instrument which shall . . . "BE PRIOR TO OR IN ANY WAY GIVE A PREFERENCE AS AGAINST OR OVER THE RIGHTS OF" . . . the bondholders.

This is reiterated and made clear by the provision in the seventh clause that "THE OBLIGATION HEREBY CREATED IS SOLELY AGAINST THE COMPANY," etc., . . .

provided "IN THE EVENT OF LIQUIDATION OR DISSOLUTION OF THE COMPANY THE OBLIGATIONS OF THIS BOND SHALL IMMEDIATELY EXTEND AND ATTACH TO ALL THE FUNDS OR OTHER ASSETS OF THE COMPANY WHATSOEVER." And, further, that "THE TOTAL BONDS OF THIS ISSUE OUTSTANDING AT ANY TIME AND AS A UNIT SHALL BE DEEMED AND TAKEN . . . TO CONTROL THE TITLE TO ALL THE PROPERTY OF THE COMPANY, REAL AND PERSONAL, AND OF EVERY KIND AND NATURE, AND FOR THE ENFORCEMENT THEREOF THE COMPANY HEREBY DECLARES AND ACKNOWLEDGES THAT IT HOLDS ALL ITS RIGHTS, INTERESTS, OR TITLE IN AND TO ANY AND ALL REAL AND PERSONAL PROPERTY OF EVERY KIND AND NATURE WHATSOEVER NOW HELD OR WHICH MAY HEREAFTER BE ACQUIRED BY IT SUBJECT TO AND IN ACCORDANCE WITH THE AFORESAID CONDITIONS," and then states that a copy of the bond has been duly filed and recorded under the laws of Arizona.

Although this language does not expressly say that all the property of the corporation is held in trust to secure these bonds prior to everything else, yet the inference that such is to be the fact is so clear that a court of equity can find no other meaning, and it is fair to assume and infer from the language used that these bonds were sold by the bankrupt and The Development Company of America and purchased by the bondholders with the distinct understanding, belief, and intention that they had a first lien upon all the property of the corporation to secure the same.

3. Equitable Liens.

That equitable liens or mortgages are created and given force by the law is well settled where equity and justice and the intention of the parties so require.

Smith v. Rainey, 9 Ariz. 362.

Richardson, Trustee v. Wren, 11 Ariz. 395.

In Re Peasley, 137 Fed. 190.

Heller v. The National Marine Bank, 45
L. R. A. 438.

Here documents were issued called "preferred stock," and the court held that they were really bonds and constituted a first lien prior to unsecured creditors. "The substance of the thing was changed, the name was retained," and "public policy requires that men . . . shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice."

In 31 Ohio State, 116, the court said, "The question in such cases is not, 'What did the parties call it,' but, 'What do the facts and circumstances require the court to call it.'"

The bondholders here cannot be both creditors and stockholders. They are not stockholders in any event.

See *Warren v. King*, 108 U. S. 389.

See also *West Chester & Philadelphia Railroad Company v. Jackson*, 77 Pa. St. 321.

In 3 Hughes, 355, the court said that it "will con-

sider that as a lien which was so intended to be by the parties."

Tatten & Company v. Tison, 54 Georgia, 139.

In 25 R. I. 456 the court held that a recital in a bond that it is "secured by all the property and assets of the company" imports that the bonds are secured by some particular lien.

4. Bondholders not Stockholders.

It has been argued by the trustee that these bondholders are in effect preferred stockholders. Nothing further from the facts can be imagined. Technical words to create a bond are used. It is so styled, the holders have no voting power. We know of no case where bondholders have been held to be preferred stockholders, yet those who have been styled preferred stockholders have been held to be bondholders.

Special attention is called to clause five on the back of the bonds that

"All bonds outstanding and unpaid shall be paid in full, both as to principal and accrued interest thereon, at the rate of six per centum per annum before any distribution is made of any of the assets of the Company TO THE HOLDERS OF THE STOCK OF THE COMPANY."

The parties have used the most significant language possible to designate these instruments as bonds, to differentiate them from stock, and to create all the rights incident to bonds and none incident to preferred stock.

5. Bonds duly Recorded.

By recording the contract executed between the bankrupt and The Development Company of America, which contained a copy of the bonds, the provisions of the local laws were fully complied with.

See Revised Statutes of Arizona, 1901, paragraphs 735, 748, 749, 3282, 3283, 3284.

There can be no question but that this contract with its annexed exhibits was a proper document for record.

Luke v. Smith, 227 U. S. 379.

But whether the recording was strictly legal or not it can make no difference. See

In Re Peasley, 137 Fed. 190,

cited at length under the seventh subdivision of the first point in this brief.

6. Trustee stands in the Shoes of the Bankrupt.

Further, there was no occasion to record the bond or to give notice to creditors, since the creditors are here represented by the Trustee in Bankruptcy, who stands in the shoes of the bankrupt, charged with full knowledge of all the facts with reference to these bonds.

Section 47 of the Bankruptcy Act as amended in 1910 cannot in any way apply to these bonds, since that amendment is not retroactive.

See Collier on Bankruptcy, 9th ed., p. 662.

Arctic Ice Mach. Company v. Armstrong County Trust Co., 27 Am. Bankruptcy Reports, 562.

Consequently, it is not necessary to take up the questions raised by the trustee.

If there are any equities against the bankrupt, they must be taken just as strongly against the trustee. The trustee "stands in the shoes of the bankrupt."

In Re Sterne et al., 26 Am. Bankruptcy Reports, 535-540.

Generally see Collier on Bankruptcy, 9th ed., pp. 658 *et seq.*

7. Generally as to Proof of Claim by Secured Creditors.

See Collier on Bankruptcy, pp. 721 *et seq.*

It is not necessary that the creditor surrender his security.

In Re Medina Quarry Company, 179 Fed. 929.

In Re Davison, 179 Fed. 750.

If the claim is secured, it is the duty of the Referee to suspend the claim pending the determination of the value of the security in some proper tribunal, or, where the parties agree, to proceed to determine the value of the security himself. This value is fixed as of the date of filing the petition.

See Collier on Bankruptcy, p. 725.

Even where the creditor by mistake proves his claim as unsecured, the Court will afterward allow him to amend and prove as secured.

Collier on Bankruptcy, p. 727.

8. Interpretation of these Bonds.

The only thing that appears upon the bond itself which would in any way be said to prevent it from having a lien upon the property is the use of the words "as hereinbefore stipulated" in the seventh clause, and that these words referred to the provisions that the bond shall be paid only from the income, and therefore nullify all the language of the fifth, sixth, and seventh clauses. It would be noted that no such language appears in clauses five and six: therefore, the provisions of these two clauses must stand absolutely. Then in clause seven occurs this phrase. This must refer to the provisions of clauses five and six especially, and cannot in any way limit or make void the natural meaning of the words in clause seven. Any other interpretation must lead to the most unreasonable sophistry, such as a statement, "This bond is payable only from income and never from anything else." "This bond shall have a first lien upon all the property and assets of the company to secure its payment except as hereinbefore mentioned."

The second statement is, of course, absolutely contradictory to the first statement, and there can be no occasion for its use unless it was put in to deceive the public. We contend that the use of that qualifying phrase in clause seven can be reconciled with the idea of a lien as set forth below, but, if it cannot be reconciled with the idea of a lien, it should be entirely disregarded, because it, as a matter of law, shows an intention to deceive the public and obtain loans under false pretenses. A misleading, harmful, and fraudulent in-

terpretation will never be adopted if any other can be found.

Great stress was laid by the trustee upon the words "and not otherwise" as used in the bonds, but it should be noted that these words do not appear after the first three clauses of the terms and conditions. It is the fifth, sixth, and seventh clauses which really create the lien and upon which this appellant largely relies.

The face of the bond and the first three clauses provide for the payment both of interest and principal out of net earnings in the usual course of business, and these provisions constitute a unit by themselves; that is, they are to govern as long as the company remains solvent and does not liquidate or dissolve.

The fourth clause then creates the necessary machinery to enable the bankrupt to pay off a part or all of the bonds on any interest day, and it is significant that this clause is entirely silent as to whether the funds for that purpose are to be obtained from net income or otherwise, and it is beyond question that, if the bankrupt had desired to pay off these bonds by selling part of its assets or otherwise using its principal, it would have had full legal right to do so, in so far as anything in the bonds might control.

Then follow the fifth, sixth, and seventh clauses, which provide what shall happen in the event that the corporation becomes insolvent and liquidates or dissolves. There is nothing in any of these three clauses which is in any way inconsistent with the prior clauses or the face of the bond, and they together build up a consistent scheme to afford the bondholders ade-

quate protection. The first provision of this scheme is contained in clause five, providing that in the event of liquidation or dissolution both principal and interest are to be paid before any distribution is made of the assets to the stockholders. It has been argued that this meant that the stockholders were to get no income until the bonds were paid, but the language "any of the assets" must include all the assets of the corporation. This clause then clearly puts the bondholders ahead of all the stockholders under the present conditions.

Then follows the sixth clause, which goes one step further to protect the bondholders, and provides that the company will not execute any instrument which shall be prior to, or give a preference as against or over, the rights of the bondholders. The object of this seems to be to prevent the possibility of creating any liens which will be prior to the bondholders either by way of subsequent bond issues, issues of preferred stock, creating secured creditors, or otherwise. It should be remembered that this bond containing this provision was duly recorded, and notice was given to the world and to all possible future creditors that the bondholders had a first claim. Again, the contention of the trustee that this clause simply prevented the company from placing prior liens upon the income is untenable. There is no such language used in the clause, and coming after clause five clearly supplements it. The words "subject to the terms and conditions of this agreement" must mean all its terms and conditions, and not simply those contained in the first three clauses. If this clause was inserted simply to prevent prior liens

being placed upon the income only, it would have been entirely unnecessary and mean nothing, since the first three clauses clearly fix the rights of the bondholders as to these earnings, and give the prior lien.

Next follows the seventh clause, which seems to be a conclusion of the whole bond. The first phrase, down to the words "provided that," summarizes the face of the bond and the first three paragraphs; that is, as to the payments from income when there is no liquidation or dissolution. Then follows the rest of this clause, limiting the first phrase, and providing what shall happen further upon liquidation or dissolution with an elaboration of the rights of the bondholders as set out in the fifth and sixth clauses, by creating a trust fund controlled by these bondholders and upon which they have a first lien to secure the payment of their bonds, thereby providing adequate machinery for the bondholders to protect their rights.

Upon liquidation the obligation shall immediately extend and attach to all the property. In what possible way can any obligation attach to property without becoming a lien upon it? Again, it provides that the company holds all its rights, interests, and title, etc., subject to and in accordance with the above provisions. This either means that the company holds its property as any person holds property, subject to all the ordinary rights, duties, and liabilities, or it means that it holds its property in trust for the benefit of the bondholders. If the first supposition is true, the language means absolutely nothing, and is worse than useless because it is exceedingly misleading. The only logical construction is the latter one; namely, that it holds its property

in trust for the benefit of the bondholders, thereby perfecting and carrying out the provisions just before that, that the obligation shall extend and attach to all of the property. But, if there were any doubts about these matters, they are entirely removed by the provision that the bonds shall be deemed and taken to control the title to all the property. What possible meaning can this have except by way of a lien? The bondholders were not stockholders in any manner and have no voice or vote in the management of its affairs. There is no possible way known to the law whereby they could control the title to the property except by way of a lien upon it. Any other result must be directly contrary to all the language used and violate the manifest intention of the parties.

The position taken by the trustee here seems to be astounding. It is beyond the realms of reason to believe that these bonds would be purchased if they were to be paid only from income, and especially in the case of an unknown corporation organized for mining purposes. We ask the Court to take judicial notice as to the impossibility to sell such a bond issued by such a company. The inference must be that all parties interested intended that the bonds should have a first lien upon all the assets in such a situation as now exists.

We have already seen that the trustee stands in the shoes of his bankrupt, and gets no better title or right than it had. Every consideration of equity and justice requires that it be determined that these bonds have a first equitable lien upon all the assets of the corporation. The fact that they amount to as much

as they do is only an added reason why a gigantic attempt on the part of a few general creditors to get the assets of this corporation away from the bondholders should not succeed, and especially so since the parties behind this movement are the very ones who were instrumental in floating and selling these bonds.

9. Conclusions.

Consequently, the appellant submits that these bondholders have a first lien upon all the assets of said bankrupt, and requests the Court to reverse the finding of the District Court, and send the matter back there for proper proceedings.

As another conclusion, if it should be determined that the bonds themselves payable from income are a contingent liability, the contention under the first subdivision of this brief is not necessary for the allowance of the proof here under this division of this brief, since here it is seen that the bonds are payable not from income, but, under present conditions, from all the assets without any contingency.

III.

If the Court should be of the opinion that these Special-Contract-Bonds on their face disclose a contract for the payment of bonds from income and are extremely ambiguous as to the question as to whether they are payable out of principal under present conditions, then this appellant contends that, since there is ambiguity as to the meaning of these bonds, oral

evidence should be received by the Court to show the real intention of the parties under well-known principles of law.

Union Bank v. Hyde, 6 Wheaton, 572.

Mechanics Bank v. Bank of Columbia, 5 Wheaton, 326.

Atkinson v. Cummins, 9 Howard, 479.

Jennie Lind Co. v. Bower, 11 Calif. 194.

Peish v. Dickson, Fed. Cases No. 10911.

Cole v. Wendel, 8 Johnson, 116.

McKee v. DeWitt, 12 N. Y. App. Div. 617.

Titchenell v. Jackson, 26 W. Vir. 460.

Ganson v. Madigan, 15 Wis. 144.

Meyers v. Maverick, 26 So. West. 716.

Fish v. Howard Admrs., 21 Wend. (N. Y.) 651.

Roberts v. Short, 1 Texas, 573.

Bell v. Martin, 18 N. J. Law, 167.

1. Such Evidence should be Received.

This has been the position of these appellants throughout, but they have been denied the opportunity to offer any such evidence up to this time. The proofs of claim were duly filed with the Referee, who in a very short time disallowed them at an *ex parte* hearing without giving these appellants any opportunity to be heard either on questions of fact or law, and the first that these appellants knew that their proofs of claim were coming up for hearing was notice of the order disallowing them.

After the petition for review of the order of the

Referee had been filed in the United States District Court for the District of Arizona, a bill in equity was filed by certain of the bondholders, to wit, George R. Blinn, Jesse P. Lyman, and Edwin Chapman, executors of the will of Amos F. Adams, late of Newton, Mass., deceased, against the said The Tombstone Consolidated Mines Company, Ltd., and its Trustee in Bankruptcy and others, to enforce a lien under certain of these bonds pursuant to said contract (which were not offered for proof in bankruptcy), alleging that it was the intention of the parties to create a first lien upon all the assets of said corporation under conditions such as now exist. This petition was brought in behalf of the plaintiffs in said bill and for all other bondholders who might take advantage thereof. This petition is still pending. This bill is put out in full in the appendix. Immediately after it was filed, a request was made of said District Court to await the determination of the matters in said petition for review until the hearing upon said bill in equity, that they might be heard and decided together and that evidence might be offered, either orally or by deposition, to show the real intention of the parties and to explain any apparent ambiguity in said bonds.

2. Request to Introduce such Evidence Made Below.

Notwithstanding this request, however, and before the pleadings were completed on said bill in equity, the District Court Judge assigned for hearing the said petition for review with others for December 23, 1912.

Briefs were duly filed with him with certain requests, and among others it was especially requested as follows:

“We have requested the continuance that the question of the allowance of these claims may be heard, at the same time with the Bill in Equity already filed to establish and foreclose the lien as claimed. This proceeding will determine the value of the property and enable the court to ascertain for how much the bonds should be proved.

Further, there is considerable evidence, both oral and written between the parties showing the intention of the corporation and its agents to constitute these bonds a first lien. All this will be shown at the hearing.”

And, again, a further request was made as follows:

“The petitioners again renew their request that the determination of this whole matter be postponed until a hearing upon the bill in equity brought by the executors of the will of Amos F. Adams now on file. They contend that whether these bonds are provable or not they create a common law lien which equity must acknowledge and enforce. Much evidence can be produced upon the general subject of the intention of the parties, their conduct and estoppel which might be of great value upon the questions raised by these proofs of claim. The rights of the bondholders should be determined once and for all and upon one proceeding.”

This request was likewise made orally in Court by counsel, correspondence and otherwise, but was never granted, and no opportunity to this day has ever been given the appellant to produce this evidence.

3. Outline of Such Evidence.

That this Court may have before it the true situation, it seems proper to state in this brief an outline of some of this evidence.

The Development Company of America, a corporation organized under the laws of the State of Delaware, entered into a contract with the said Tombstone Consolidated Mines Company, Ltd., to sell these Special-Contract-Bonds, which contract was duly recorded under the laws of the State of Arizona. The contract is annexed to this brief in the appendix as Exhibit A to the bill of complaint. The Development Company of America itself and through agents in New York City proceeded to advertise widely the sale of these bonds throughout New York, Massachusetts, and elsewhere, and caused to be printed and distributed a circular stating that said bonds were secured by properties which had produced over \$30,000,000 from the surface to an average depth of 500 feet, and that the title to said property should in effect be with such bondholders ratably until such bonds should have been retired with interest; and, as a result of this and other like statements, the bonds in question were sold to the persons named in the proof of claim, mostly people of small means and widely scattered. The sales were made for the full value of the bonds, and

on the explicit representation that the bonds gave a first lien upon all the assets under conditions like those now existing. That those now claiming to be largely interested as general creditors, whose claims have been allowed, are:

Empire Trust Co., 42 Broadway, New York, N. Y.	\$621,182.36
The Development Company of America, 11 Pine Street, New York, N. Y. . .	48,241.01
Thomas W. Joyce, 23 Wall Street, New York, N. Y.	1,752,431.68
James Douglass, New York, N. Y. . . .	12,358.10
F. M. Murphy, Prescott, Ariz.	74,450.00
<hr/>	
Total	\$2,508,663.15

That all the foregoing had some active part in the sale of said bonds, either as officers or agents of said bankrupt, fiscal agents, or otherwise, and that the same counsel who acted for the above creditors in proving their claims has acted in the interests of the trustee in this proceeding.

4. Doctrine of Estoppel Applies Here.

In other words, the very people who brought about the sale of these bonds and have profited largely thereby, either directly by way of commissions or indirectly through the bankrupt company, and who made the misrepresentations and misled the public (if our contention as to the bonds constituting the liens is

not correct) are now forever estopped by their contract from denying that said bonds constitute a lien or from asserting adverse claims. All creditors and persons claiming under the bankrupt stand in the shoes of the bankrupt and in no better position.

Pomeroy on Eq. Jur., 3d ed., p. 1415, etc.,
and p. 1439.

Bigelow on Estoppel, 5th ed., p. 459, etc.,
p. 556, etc.

Central Railroad Co. of N. J. v. McCartney,
68 N. J. Law, 165, where Mr. Justice
Pitney wrote the opinion.

Soward v. Johnson, 65 Mo. 102.

Story's Eq. Jur., 13th ed., Vol. 1, p. 207
(note).

Railway Company v. Jones, 73 Miss. 110.

Goodenow v. Ewer, 16 Cal. 461.

Mattoon v. Young, 45 N. Y. 696.

Nickerson v. Mass. Title Ins. Co., 178
Mass. 308.

Lincoln v. Gay, 164 Mass. 537.

5. Conclusion.

Of course, this line of procedure must depend upon the introduction of evidence, and it is for this reason that we have asked an opportunity to offer evidence. If the Court feels that there is any serious doubt as to whether these bonds do give these bondholders a first lien under present conditions, then we ask that the whole matter be sent back to the District Court

with instructions to hear this evidence and such other along these lines as may be proper, that the rights of the bondholders may be fairly and fully determined with reference to all the circumstances of the case.

Respectfully submitted,

ADAMS & BLINN,
AMOS L. TAYLOR,
DOAN & DOAN,

Counsel for the Appellant.

APPENDIX.

(Copy of Bill in Equity.)

UNITED STATES OF AMERICA.

IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF ARIZONA.

GEORGE R. BLINN,

JESSE P. LYMAN, and

MERRILL K. GREEN, executors of the
will of Amos F. Adams,*Plaintiffs**v.*THE TOMBSTONE CONSOLIDATED MINES
COMPANY, LTD., andA. L. GROW, Trustee in bankruptcy of
the property of said The Tombstone
Consolidated Mines Company, Ltd.,
andTHE DEVELOPMENT COMPANY OF
AMERICA,*Defendants.*In Equity.
Number

BILL OF COMPLAINT.

*To the Judges of the United States District Court for the
District of Arizona:*George R. Blinn, Jesse P. Lyman and Merrill K.
Green respectfully represent, allege, complain and
say, as follows:

First. That the said George R. Blinn is a resident of Bedford, the said Jesse P. Lyman, a resident of Ashby, both in the County of Middlesex and the said Merrill K. Green is a resident of Boston, in the County of Suffolk and all in the Commonwealth of Massachusetts and that all said parties carry on and have a usual place of business at said Boston and all are citizens and residents of said Commonwealth and they bring this bill of complaint against The Tombstone Consolidated Mines Company Ltd., a corporation duly organized under the laws of the territory of Arizona and now existing under the laws of the State of Arizona and having its office and principal place of business at Tombstone within said State and being a citizen and resident thereof; and

A. L. Grow of Arizona, a citizen and resident of said State of Arizona; and

The Development Company of America a corporation duly organized and existing under the laws of the State of Delaware having its principal office in the City of Dover in said State of Delaware and with an office and doing business in the city, county and State of New York and a citizen and resident of said State of Delaware.

Second. That upon information and belief on or about December 14, 1911 the said The Tombstone Consolidated Mines Company, Ltd., made and executed with the said Development Company of America a certain contract in writing, a copy of which is hereto annexed and marked Exhibit A and made a part hereof and may be referred to for any and all provisions thereof and that the said contract was duly

filed and recorded with the records of the County of Cochise in the State of Arizona on January 22, 1902 at 9 A.M. in Book 6 of miscellaneous records at pages 45-62 inclusive.

Third. That upon information and belief said Development Company prior to the execution of said contract, marked Exhibit A, had agreed to furnish The Tombstone Consolidated Mines Company, Ltd., with large sums of money, the exact amount being unknown to the plaintiffs, to be used by it for the purpose of developing certain mines within the State of Arizona and to carry on its business and that said agreement in writing, marked Exhibit A, was executed pursuant to and is a part of said agreement and to provide a means by which the said Development Company of America might be able to raise funds for that purpose.

Fourth. That upon information and belief said agreement in writing, marked Exhibit A, provided, among other things, that the said The Tombstone Consolidated Mines Company, Ltd., should issue and deliver a series of Special-Contract-Bonds not exceeding, in the aggregate par, the sum of \$3,000,000 to be in the form described in said agreement which bonds, it had been agreed between said parties, the said Development Company of America should sell in various denominations to the public and that pursuant to said agreement the said The Tombstone Consolidated Mines Company, Ltd., did issue and the said Development Company of America did sell to the public and to a great many persons said bonds mentioned in said agreement, marked Exhibit A, to

the par value of about \$3,000,000, the exact amount being unknown and among others did issue and sell one of said Special-Contract-Bonds of the series mentioned in said agreement, marked Exhibit A, of the par value of \$5000, dated July 31st, 1902 to Amos F. Adams of Newton in said County of Middlesex and said Commonwealth, a copy of which is hereto annexed and marked Exhibit B and may be referred to for any and all provisions thereof.

Fifth. That the said Amos F. Adams died on or about January 4, 1911 leaving a will which was duly proved and allowed by the Probate Court for said County of Middlesex on or about February 17, 1911 and on said date the said George R. Blinn, Jesse P. Lyman and Merrill K. Green were duly appointed executors of said will and are the duly qualified and acting executors and as such are the present holders and owners of said bond for \$5000 issued to the said Amos F. Adams as aforesaid and all rights thereto, therein and thereunder.

Sixth. That said contract in writing and said bond, among other things, provides:

“In the event of liquidation or dissolution of the Company, all Bonds outstanding and unpaid shall be paid in full, both as the principal and accrued interest thereon, at the rate of six per centum per annum, before any distribution is made of any of the assets of the Company to the holders of the stock of the Company.”

and in the event of such liquidation or dissolution,
“the obligations of this Bond shall immediately ex-

tend and attach to all the Funds and other assets of the Company whatsoever."

"Clause VI. It is further agreed that the Company will not execute, sign or deliver any Mortgage, Deed of Trust, Conveyance, Lease, Release or Waiver, or other instrument which shall, subject to the terms and conditions of this Agreement, be prior to or in any way give a preference as against or over the rights of the holder of this Bond or of any other Bond of like issue."

Seventh. That upon information and belief the event of liquidation or dissolution of said The Tombstone Consolidated Mines Company, Ltd., has arrived in that on or about August 10, 1911 it was duly adjudicated a bankrupt by the District Court of the Second Judicial District of the Territory of Arizona having and exercising jurisdiction under the United States Bankruptcy Laws and that on or about September 2, 1911 the defendant A. L. Grow was duly elected and appointed trustee in bankruptcy of the property of said corporation and is the duly qualified and acting trustee of such property and that on or about September 22, 1911 the said Grow as trustee, as aforesaid, was duly authorized to continue the business of the said corporation and has been carrying on the same to liquidate and wind up its affairs pursuant to the laws of the United States of America with reference to bankruptcy.

Eighth. That, upon information and belief, at the time of such adjudication in bankruptcy the said bankrupt owned real estate situated at or near Tomb-

stone in the County of Cochise and then territory of Arizona and now the State of Arizona a large number of lots of land, mines and mining claims as per schedule and description thereof hereto annexed and marked Exhibit C which may be referred to for any and all items and descriptions thereof.

Ninth. That upon information and belief, at the time of such adjudication in bankruptcy the said bankrupt owned personal property situated at or near Tombstone, in the County of Cochise and then territory of Arizona and now State of Arizona as per schedule and description thereof hereto annexed and marked Exhibit D which may be referred to for any and all items and descriptions thereof and that all the same is located upon the real estate described in the preceding paragraph hereof.

Tenth. That, upon information and belief, it was the intention and purpose of the said The Tombstone Consolidated Mines Company, Ltd., and The Development Company of America when said contract marked Exhibit A was executed and said bonds issued thereunder, including the plaintiffs' bond, that, in the event of the adjudication in bankruptcy of said The Tombstone Consolidated Mines Company, Ltd., or any other like proceeding, all holders of said Special-Contract-Bonds should have a first lien upon all the assets of said corporation, both real estate and personal property, for the payment of said bonds and that said bonds were sold by the said The Development Company of America and said bankrupt and by persons claiming by, through or under them, or either of them, upon representations that the holders of said

bonds, including the plaintiffs' said bond, would have such first lien ratably and that it was advertised, especially by the fiscal agent of the said The Development Company of America, that said bonds were secured by properties which had produced over \$30,000,000 from the surface to an average depth of 500 feet and that the title to the said property should in effect be with such bondholders at all times until said bonds should have been retired with interest.

Eleventh. That, upon information and belief, since the issuance of said Special-Contract-Bonds and especially the plaintiffs' said bond, the said The Tombstone Consolidated Mines Company, Ltd., has incurred certain indebtedness amounting to large sums of money, considerably in excess of \$1,000,000 either through the said The Development Company of America or otherwise and that the holders of such indebtedness, as creditors of said bankrupt are now represented by said trustee in bankruptcy, who was the Secretary and Treasurer of said bankrupt and who now seeks, in the interests of such unsecured creditors, to prevent the application of the assets of said bankrupt to the payment of said Special-Contract-Bonds, including the plaintiffs' said bond.

Twelfth. That by the terms of said bond the said The Consolidated Mines Company, Ltd., on the date of its said adjudication in bankruptcy owed the plaintiffs, as executors as aforesaid, the principal sum of said bond to wit: Five thousand (5000) dollars together with interest at the rate of 6 per cent. per annum from its date, July 31st, 1902, and the said corporation

still owes these plaintiffs as executors as aforesaid the said amount of said bond together with interest thereon to this date in full and that by the terms of said bond the said Adams as registered owner thereof would have had, had he survived, and the plaintiffs, as executors of the will of said Adams now have a first lien for the payment thereof both as to principal and interest as aforesaid, including any interest which may hereafter accrue on said bond, upon all the funds and assets of said bankrupt whatsoever and wherever situated both real estate and personal property including all the real estate, personal property, rights and privileges as hereinbefore described and that these plaintiffs are entitled to have said assets applied to the payment of their said bond.

Thirteenth. That, upon information and belief, the only way that said property of said bankrupt may be reached and applied to the payment and satisfaction of said bond is by an order of this Honorable Court for the sale and disposition of the said assets and property or so much thereof as may be necessary to pay the plaintiffs' claim as aforesaid under the process of this court; that the plaintiffs have no plain, adequate and complete remedy at law in the premises and that they bring this bill for the benefit of themselves to realize upon said bonds as hereinbefore described and any and all other bonds of said series which they may now or hereafter own and also for the benefit of all other holders and owners of said Special-Contract-Bonds of the same series as aforesaid who may desire to intervene and become parties to these proceedings.

Fourteenth. That said Contract marked "Exhibit A" was executed and inured for the benefit of the holders of any of said bonds of the series above described as assignees of said The Development Company of America and that all the terms and conditions of such agreement in writing and of said bonds are binding upon all persons claiming under said The Tombstone Consolidated Mines Company, Ltd., and said The Development Company of America.

WHEREFORE the Plaintiffs pray as follows:

First: That the Plaintiffs' claim against the said The Tombstone Consolidated Mines Company, Ltd., under and pursuant to the bond, a copy of which is hereto annexed and marked "Exhibit B" may be established in the sum of five thousand dollars with interest at six per cent. from July 21st, 1902, and that the Plaintiffs recover the same as damages with their costs and that the process of this Court issue therefor.

Second: That the Plaintiffs' claims against the said The Tombstone Consolidated Mines Company, Ltd., under and pursuant to any and all other of the said bonds of the same series as the one mentioned in the last prayer which the Plaintiffs now or hereafter may own may be established in accordance with the terms thereof with interest and that the plaintiffs recover the amount thereof as damages with costs and that the process of this Court issue therefor.

Third: That it be decreed that the Plaintiffs have a first lien upon all the funds, assets and property of said The Tombstone Consolidated Mines Company, Ltd., to secure to them the payment of all sums of

money due them under the said Special-Contract-Bond and any and all other like bonds which they may now or hereafter own, ratably with all other like bondholders who may join in these proceedings.

Fourth: That the plaintiffs may have a foreclosure of such lien, and to that end that this Honorable Court may order a sale of all the funds, assets and property of said The Tombstone Consolidated Mines Company, Ltd., or so much thereof as may be found necessary, under the process of this Court, to obtain sufficient funds to pay the plaintiffs' said claims and the claims of all other like bondholders who may join herein.

Fifth: To the end therefor that the defendants may if they can show why the plaintiffs should not have the relief herein prayed for, that they under oath individually and by their proper officers and according to the best and uttermost of their knowledge, remembrance and belief, full, true, direct and perfect answers make to such of the several interrogatories hereinafter written as they are required to answer, that is to say:

Did the said The Tombstone Consolidated Mines Company, Ltd., and said The Development Company of America enter into an agreement in writing on or about July 16th, 1901, whereby the said The Development Company of America bound itself to furnish and pay to said The Tombstone Consolidated Mines Company, Ltd., certain moneys in exchange for the issuance and delivery of the series of Special-Contract-Bonds hereinbefore described and if so, annex and set forth the full complete and entire terms and conditions thereof.

Sixth: And for as much as the Plaintiffs have no adequate relief except in a Court of Equity and to the end that the Defendants may if they can show why the Plaintiffs should not have the relief herein prayed for that the defendants make under oath, according to their best and uttermost knowledge, remembrance, information and belief individually full, direct, true and perfect answers to all and singular the premises and to the several matters hereinbefore set forth and charged as fully, completely and particularly as if severally and separately interrogated as to each and every of said matters and that they and especially the defendant, A. L. Grow, may be compelled to render an account of all and singular the property, estate, goods and chattels of said The Tombstone Consolidated Mines Company, Ltd., now in his hands and possession, in so far as may be necessary for the purposes hereof.

Seventh: May it please your Honors to grant unto the plaintiffs a writ of subpœna out of and under the seal of this Honorable Court directed to these defendants commanding them on a day certain to appear before this Honorable Court and make answer to this bill of complaint and to perform, stand to and abide such orders and decrees as may be held against them under the penalties of the Law in such cases made and provided.

Eighth: For such other and further relief as to this Honorable Court may seem meet and as justice and equity may require.

UNITED STATES OF AMERICA
COMMONWEALTH OF MASSACHUSETTS } ss.
COUNTY OF SUFFOLK,

I, George R. Blinn, one of the plaintiffs above-named make oath and say that I have read the foregoing Bill of Complaint subscribed by me and know the contents thereof and that the same is true of my own knowledge, except as to matters therein stated to be upon my information and belief, and as to these matters I believe them to be true.

(Sd) GEO. R. BLINN

SUBSCRIBED AND SWORN to Before me
this Twelfth day of December, A.D. 1912.

(Sd) AMOS L. TAYLOR

Notary Public.

CONTRACT.

EXHIBIT A (attached to Bill in Equity).

THIS AGREEMENT, made and entered into this fourteenth day of December, 1901, by and between The Tombstone Consolidated Mines Company, Ltd., a corporation duly organized under the laws of the Territory of Arizona, (hereinafter referred to as the Tombstone Company) having its principal office in Prescott Ariz., Party of the First Part, and The Development Company of America, a Corporation duly or-

ganized under the laws of the State of Delaware, (hereinafter referred to as The Development Company) having its principal office in the City of Dover, State of Delaware, and its principal place of doing business in the City of New York, State of New York, Party of the Second Part

WITNESSETH, That.

WHEREAS, the Tombstone Company has by purchase become and now is the owner and holder of certain option contracts for the purchase of, and for mining leases on, certain mines and mining locations, together with mining machinery and other property and improvements connected therewith, and situate in the Tombstone Mining District, Cochise County, Arizona, which are more fully described and set forth in a list thereof which is attached hereto, marked "Exhibit A" and made a part hereof, and *and*

WHEREAS heretofore, to-wit:—on the 16th day of July, 1901, a contract was entered into by the terms of which the Development Company, bound itself to furnish and pay to the Tombstone Company, certain moneys; and, as a part of the consideration expressed in said contract, the Tombstone Company became bound to authorize and has authorized the execution, issuance and delivery of a Series of Special-Contract-Bonds, (hereinafter referred to as Bonds), not to exceed, in the aggregate at par, the sum of three million dollars (\$3,000,000), which bonds, so authorized, were and are to be in the form and to contain the terms, privileges and considerations set forth in a copy thereof which, with its coupons attached, is attached

hereto, marked "Exhibit B" and made a part of this Agreement.

NOW, THEREFORE, in consideration of One Dollar in hand paid, by each of the parties hereto to the other, the receipt whereof is hereby acknowledged, and in consideration of the premises and of the reciprocal rights and benefits accruing and to accrue to the parties hereto and to their assigns hereunder, it is agreed by and between the Tombstone Company and the Development Company, as follows:

Clause I. That each and every clause of the copy of the bond hereto attached, marked "Exhibit B," and made part of this agreement, is hereby affirmatively adopted and made part of this agreement as fully and as completely as though they were written on the face hereof at full length.

Clause II. It is further agreed that, for the protection and benefit of all present or future holders of said bonds or any of them, that this agreement, together with its Exhibits, shall be recorded and spread upon the public records of Cochise County, Territory of Arizona.

Clause III. It is further agreed that this contract shall bind and benefit the successors and assigns of the respective parties hereto and shall extend to and benefit the holders of any of the bonds of the Series of Special-Contract-Bonds above mentioned and described, as assignees of the Development Company.

IN WITNESS WHEREOF The Tombstone Consolidated Mines Company, Ltd., and The Development Company of America have caused their corporate names to be signed hereto, respectively, by their proper officers, and their respective corporate seals

to be hereunder affixed in duplicate, on the day and year first above written.

THE TOMBSTONE CONSOLIDATED MINES COMPANY,
LIMITED,

By F. M. MURPHY, *Vice Pres't.*

And by HENRY M. ROBINSON, *Secy.*

[SEAL]

Party of the First Part.

THE DEVELOPMENT COMPANY OF AMERICA

By E. H. HOOKER, *Vice Pres.*

And by JNO. B. LEAKE, *Secy.*

[SEAL]

Party of the Second Part.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

On the 14th day of December in the year nineteen hundred one, before me personally came Henry M. Robinson and Frank M. Murphy, to me known, who being by me duly sworn did depose and say that he the said Henry M. Robinson resided at Wick Avenue in the City of Youngstown, State of Ohio; that he the said Frank M. Murphy resided in the City of Prescott, Territory of Arizona; that he the said Frank M. Murphy is the Vice President and he the said Henry M. Robinson is the Secretary of The Tombstone Consolidated Mines Company, Limited, the corporation described in and which executed the above instrument, as Party of the First Part; that he the said Frank M. Murphy and he the said Henry M. Robinson knew the seal of said corporation; that the

seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Executive Committee of said corporation and that they signed their names thereto by like order.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal.

CHAS. E. HUNTER,
*Notary Public in New York
County, New York.*

[SEAL]

STATE OF NEW YORK
COUNTY OF NEW YORK ss.

On the 14th day of December in the year nineteen hundred one, before me personally came Elon H. Hooker and John B. Leake, to me known, who being by me first duly sworn did depose and say that he the said Elon H. Hooker resided at #118 Riverside Drive, in the City of New York, State of New York; that he the said John B. Leake resided at 119 West 95th Street, in the City of New York, State of New York; that he the said Elon H. Hooker is the Vice President and he the said John B. Leake is the Secretary of The Development Company of America, the corporation described in and which executed the above instrument, as Party of the Second Part; that he the said Elon H. Hooker and he the said John B. Leak knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Executive Committee of said corporation and that they signed their names thereto by like order.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal.

CHAS. E. HUNTER

Notary Public for New York

County, New York.

[SEAL]

“EXHIBIT A” (attached to Contract).

First: An option for the purchase of the property formerly belonging to the Grand Central Mining Company, and now standing in the name of Martyn Bonnell, consisting of:

Alkey	Shorty
Hidden Treasure	Maine
Last Chance No. 2	Mexican
Silver Thread	Revenue
Chance	Contact
Standard	Triple Ex
Moonlight	Emerald
Naumkeag	Grand Dipper
Extacy	Brother Jonathan
Grand Central	
The Cocopah Mining Claim	
The Central Mining Claim	
The Lowell Mining Claim	
The North Point Mining Claim	
The Boss Mining Claim	

Those two certain dwelling houses, three small houses, one stable building, assay office, shop, boiler house, and one hoisting engine partly erected, situated upon the Grand Central Mine.

One dwelling house, one shaft house and one hoisting engine, situated on the Maine Mine.

One shaft house, one hoisting engine and boilers and three small houses situated on the Emerald Mine.

One shaft house with engine and boiler, situated upon the Silver Thread Mine.

One engine and boiler, one shop and one ore house, situated upon the Chance Mine.

One boiler house with boiler, situated upon the Boss Mining Claim.

One thirty stamp Quartz Mill, situated on the San Pedro River, near the town of Fairbank, known as the Grand Central Mill.

All the tools, lathes and old machinery now on the dumps and upon the property hereinbefore described.

Second: An option for the purchase and lease of the claims formerly owned by The Tombstone Mining and Milling Company, now standing in the name of Waldrum J. Cheney, consisting of certain mining claims located in the Tombstone District, a list of which is as follows, to wit:

Way Up	Defense
Gilded Age	East Side
Mountain Maid	Tribute
Goodenough	East Side No. 2
Toughnut	Lucky Cuss
Girard	McCann
North Sulphuret	Owl's Nest
West Side	The Owl's Last Hoot

and two others.

Third: A contract of option and lease on certain property owned by The Contention and Consolidated

Mining Company, consisting of certain mining claims located in the Tombstone District, as follows, to-wit:

Contention Claim

Flora Morrison

South Sulphuret,

and one other.

Fourth: A contract and option of purchase of certain property owned by the Head Centre and Tranquility Mining Company, consisting of that part only of certain mining claims located in The Tombstone District as follows, to wit:

Tranquility

Head Centre

Yellow Jacket

Fortuna

which lies below a horizontal plane 470 feet below the collar of the Tranquility shaft.

Fifth: A contract of option and lease on certain property owned by The Empire Mining and Milling Company consisting of certain mining claims located in the Tombstone District as follows, to wit:

Empire Claim

Sixth: A contract of option and lease on certain property owned by The Contentment Mining and Milling Company, consisting of certain mining claims located in the Tombstone District.

Seventh: An option for the purchase of the Vizina Claim, located in the Tombstone District.

Eighth: An option for the purchase of the Poor Claim, located in the Tombstone District.

"EXHIBIT B" (attached to Contract).

(COPY OF BOND.)

No.	Amount,
-----	---------

Total authorized issue Special-Contract-Bonds not to exceed at par \$3,000,000 Capital Stock \$15,000,000.
—Corporation of Arizona.

The Tombstone Consolidated Mines Company Limited.
"Exhibit B." SPECIAL CONTRACT BOND.

KNOW ALL MEN BY THESE PRESENTS; That The Tombstone Consolidated Mines Company, Limited (hereinafter referred to as the Company) a corporation duly organized and existing under the laws of Arizona, has by a resolution of its Board of Directors authorized the issuance and sale of a series of Special-Contract-Bonds, which shall not exceed, at par, the aggregate sum of Three Million Dollars (\$3,000,000) and shall be numbered consecutively from one (1) upwards, and be of like terms and tenor, except as to their respective amounts. The holders of said Special-Contract-Bond, or any of them, shall have the same rights in all matters relating to payment of interest or of the principal of said Bonds, without priority or preference. The principal of each Bond shall be divided into twenty equal parts and be represented by a like number of coupons thereto attached.

BE IT FURTHER KNOWN, that for value received, the Company hereby agrees to pay to the registered holder of this Special-Contract-Bond, which is of the above series and issue, and is of the par value of

Dollars, the face value hereof in Gold coin of the United States of America, of the present weight and fineness, or its equivalent, and is payable in twenty equal installments represented by the attached coupons, from and out of a Retirement Fund, created from the net surplus earnings of the Company as hereinafter stipulated, at the times and upon the terms and conditions hereinafter stated, but not otherwise; also that the company agrees to pay to the registered holder hereof, in like gold coin, from an Interest Fund created from the net surplus earnings of the Company, as hereinafter stipulated and not otherwise, interest on the face value of this Bond or so much thereof as may from time to time remain unpaid, at the rate of six per centum per annum payable semi-annually in equal installments on the first days of January and July in each year before any dividends are paid on the stock of the Company. All payments of principal, interest and dividends are to be made by the Company at its office in New York City, Prescott, Arizona, or at the office of The Manhattan Trust Company in New York City.

BE IT FURTHER KNOWN, that this Bond has been duly registered in the name of the holder by the duly authorized Registrar and Transfer Agent of the Company; that this Bond is negotiable, but is transferable only by the registered holder or by a duly authorized attorney, on the books of the Company as kept by its Transfer Agent, and such transfer similarly noted on this Bond.

BE IT FURTHER KNOWN, that the terms and conditions governing the payment of this Bond, and the

payment of the installment coupons hereto attached, and the interest hereon, are endorsed on the back hereof and are hereby expressly made a part of this Agreement, as much so as if they were fully written on the face of this Bond, and that this Special-Contract-Bond shall not be valid or obligatory for any purpose until the Certificate endorsed on the back hereof, has been duly signed by the Registrar of the Company.

IN WITNESS WHEREOF, The Tombstone Consolidated Mines Company, Limited, has caused this Special-Contract-Bond to be signed by its

President and

Secretary, and its corporate seal to be hereunto affixed, and the annexed coupons to be signed by its Treasurer, this day of 190 .

President.

Secretary.

(On inside of bond.)

TERMS AND PRIVILEGES OF SPECIAL CONTRACT BOND.

This Special Contract Bond (hereinafter referred to as Bond), as well as all others of the same series, is authorized, sold and issued by the Tombstone Consolidated Mines Company, Limited, (hereinafter referred to as the Company), and has been purchased and accepted by the holder hereof, for himself and assigns, subject to the following terms and conditions; that is to say;

Clause I. The net proceeds derived from the sale of this and other Bonds of the same issue, shall be held

in the Treasury of the Company, or be strictly applied by the Company to the purchase of any or all of the properties and mining claims at Tombstone, Arizona, now under contract by it; and independently or with some separate company organized for such purpose, to the cost of construction, maintenance, or control of a railroad to be used in connection with said properties, or to the purchase of stock or bonds in such a railroad company, all as the Board of Directors of the Company may or may not deem advisable; and to the acquisition of such other mining claims and properties as the Company may decide to secure; and to the purchase, installation and maintenance of suitable mining and milling machinery, for the development and operation of all such properties, as are now under contract, or hereafter may be acquired or controlled, in connection with the business of the Company, and to all legitimate and reasonable expenditures in connection therewith; or for any other purpose or object, for which the Company was incorporated, whenever such expenditures shall have been first approved by the Company, and for such other purpose or object only.

Clause II. Out of the earnings of the Company the Board of Directors or Executive Committee shall create and maintain certain special funds for the particular uses and held under the particular names as hereafter in this clause set forth, to wit:

(a) An Operating Fund, for carrying on the current business of the Company, which, in the opinion of the Board or Committee, shall be sufficient for such purpose, but shall not exceed at any one time the sum of Three Hundred Thousand (\$300,000) Dollars.

(b) An Interest Fund, which, in the opinion of the Board or Committee, shall be sufficient to promptly meet and pay the semi-annual interest payments on all Bonds outstanding and unpaid, but which fund shall not exceed at any one time the sum of Ninety Thousand (\$90,000) Dollars; it being hereby expressly agreed and understood that no payment of interest is promised or shall be made hereunder, except from and out of the Interest Fund, in this Clause named, and that said Fund shall be created and maintained solely from the surplus earnings of the Company as herein set forth and not otherwise.

(c) A Retirement Fund, from which shall be paid, from time to time, the installment coupons attached to all Bonds issued and sold, and to which shall be transferred all net surplus earnings of the Company not required for the creation and maintenance of the special funds hereinbefore named, or for the payment of dividends upon the stock of the Company, which stock dividends shall not be cumulative, and shall not exceed four per centum per annum, until such time as all Bonds issued by the Company shall have been paid and redeemed.

Clause III. The earnings of the Company under the supervision and within the judgment and discretion of the Board of Directors or Executive Committee, shall be used, paid and applied for the following purposes, but only in the order herein in the clause stated; that is to say;

(a) All current expenses of the Company shall be paid or provided for, and the Operating fund at all times be kept as nearly unimpaired as the earnings of the Company will permit.

(b) All earnings yet remaining shall be used and applied to the payment of all interest installments, due on all Bonds outstanding and unpaid, and to keep the Interest Fund for such purpose at all times as nearly unimpaired as the earnings of the Company available for such purpose will permit.

The interest on this, and all other Bonds of like issues, shall be cumulative and shall be payable semi-annually, on the first days of January and July of each year, at the rate of six per centum per annum on their par value, or any unpaid portion thereof. Should the surplus or net profits arising from the business of the Company and available for the Interest Fund herein named according to the terms of this agreement, prior to any interest day, be insufficient to pay the interest then due on this and other Bonds of the same series, such interest shall be payable from future profits available for and in such Fund, and no dividend shall at any time be paid upon the stock of the Company, until the full amount of interest at the same rate of six per centum per annum, up to that time, upon the par value of all Bonds, outstanding and unpaid, shall have been paid or set apart for payment.

(c) All earnings of the Company yet remaining may, within the discretion of the Board or Committee, be used in the payment of dividends on the stock of the Company, but at a rate of not to exceed four per centum per annum, which stock dividends shall not be cumulative, and shall not exceed the limit herein named until all Bonds issued and outstanding with accrued interest, shall have been fully paid, as herein provided.

(d) All earnings of the Company still remaining shall be transferred to the Retirement Fund, and whenever the cash on hand in said Fund shall equal one-twentieth of the face value of all Bonds then outstanding and unpaid, the Company shall promptly pay and retire one of the installment coupons of this Bond and one of the installment coupons of all other Bonds of this series then outstanding and unpaid.

Whenever a sufficient sum shall have accumulated in said Retirement Fund for such purpose, written notice thereof shall be promptly mailed to all registered holders of outstanding Bonds, according to the last address given and shown by the books of the Company, and the sums necessary to retire one installment coupon on each of the said outstanding Bonds, shall be deposited with the Manhattan Trust Company of New York City, or with its successor or successors in the trust (hereinafter called the Trust Company), in trust for and subject to the order of each of such registered holders, and each of such installment coupons shall be paid, upon presentation and surrender, at the offices of The Trust Company; and interest upon so much of each of said Bonds as the amount deposited will redeem and pay, shall cease from and after ten days subsequent to the mailing of said notice. Upon surrender of said coupons, they shall be cancelled by the Trust Company, and the payment thereof shall to such extent constitute a payment of this and other outstanding Bonds of the same series and issue.

All monies so deposited for the payment of such coupons shall be held by The Trust Company at the risk of the holder of this and other like Bonds, from

and after the expiration of ten days subsequent to the mailing of such notice. The Company in lieu of depositing such funds with the Trust Company as herein provided, shall have the right, upon the giving of proper written notice, to make direct payment of such coupons out of the Retirement Fund of the Company, at its office in New York City or Prescott, Arizona, and with like effect, as if paid through the Trust Company.

The determination of the Board of Directors or Executive Committee with reference to the application, use, distribution and payment of the earnings of the Company as in this clause indicated, when made in good faith, shall be conclusive and binding upon the holders of all Bonds, issued, outstanding and unpaid.

Clause IV. The Company reserves the right to retire all Bonds, issued and outstanding, at any interest paying date after June 1st, 1902, by the payment of the full face value of such Bonds, together with all accrued and unpaid interest at the rate of six per centum per annum up to such time. Provided, the Company shall not exercise this right of redemption as to any number of Bonds less than the whole number then issued, outstanding and unpaid. Provided, further, that notice of the Company's desire to retire such Bonds shall be mailed to the registered holder of the same at least thirty days before the interest date fixed for such retirement; also that the Company has deposited at the same time with the Trust Company, at its offices in New York City, or holds for such specific purpose in the Retirement Fund of the Company, a sufficient sum to meet and pay all of the said Bonds,

or any amount remaining due thereon. After such date, if such notice shall have been given and if a sufficient deposit of money has been made, or is so held, as herein required, such notice and deposit or holding shall constitute a full payment of this Bond, and of all other bonds of like issue and all interest thereon from such time shall cease; and the money so placed with the Trust Company, or held in the Retirement Fund of the Company, shall thereafter be held at the risk of the holder of this, and of all other Bonds of like issue.

Clause V. In the event of liquidation or dissolution of the Company, all Bonds outstanding and unpaid shall be paid in full, both as the principal and accrued interest thereon, at the rate of six per centum per annum, before any distribution is made of any of the assets of the Company to the holders of the stock of the Company.

Clause VI. It is further agreed that the Company will not execute, sign or deliver any Mortgage, Deed of Trust, Conveyance, Lease, Release or Waiver, or other instrument which shall, subject to the terms and conditions of this Agreement, be prior to or in any way give a preference as against or over the rights of the holder of this Bond or of any other Bond of like issue.

Clause VII. It is expressly agreed and understood by the holder of this Bond that the obligation hereby created is solely against the Company as such, and is only against the Retirement Fund created from the surplus earnings of the Company, as hereinbefore stipulated. Provided that in the event of liquidation or dissolution of the Company, the obligations of this Bond shall immediately extend and attach to all the

Funds and other assets of the Company whatsoever, as in Clause V. of this instrument, above stipulated and set forth. The Company further covenants and agrees that the total Bonds of this issue outstanding at any time and as a unit shall be deemed and taken, subject to and in accordance with the conditions hereinbefore set forth, to control the title to all the property of the Company, real and personal, and of every kind and nature and for the enforcement thereof the Company hereby declares and acknowledged that it holds all its rights, interests or title in and to any and all real and personal property, of every kind and nature whatsoever, now held or which may be hereafter acquired by it, subject to and in accordance with the aforesaid conditions, and that the Company has caused a copy of this Special-Contract-Bond to be duly filed and recorded in the County of Cochise, Territory of Arizona, in which the properties of the Company are situate.

Clause VIII. This Bond is authorized, sold, issued purchased and accepted upon the terms and conditions hereinbefore stated, and none other, and no officer, agent, or other representative of the Company shall have the power to waive or modify any provision or condition of this Agreement, or to add any other provision or condition thereto.

(Attached to Bond.)

INSTALLMENT COUPON OF THE TOMBSTONE CONSOLIDATED MINES COMPANY, LIMITED.

No.

This Coupon is one of twenty coupons of like term and tenor and represents one twentieth of the prin-

cial of Special-Contract-Bond No. to which it, with the other nineteen coupons thereto belonging is attached. Payment hereof will constitute a payment of one twentieth of said Special-Contract-Bond as provided by the terms hereof.

Payment of this Coupon in the sum of

Dollars will be made by the Tombstone Consolidated Mines Company, Limited, from the Retirement Fund of said Company created in the manner and applicable to the payment hereof as per the terms and conditions stipulated in the attached Bond and not otherwise. Payment hereof will be made only upon its surrender and cancellation at the office of the Company in New York City, Prescott, Arizona, or at the office of the Manhattan Trust Company in New York City according to and upon notice given to the registered holder of the Special-Contract-Bond to which it is attached informing the holder that the amount hereof is held or has been deposited for the payment and redemption of this coupon all as provided in said Special-Contract-Bond.

Treasurer.

ENDORSEMENT.

THIS IS TO CERTIFY, that the within Special-Contract-Bond is one of the series and issue authorized by The Tombstone Consolidated Mines Company, Limited, and is of the par value of

Dollars; that the par value of this Bond when added to the par value of all the Special-Contract-Bonds of said series and issue heretofore

issued, sold and outstanding, does not exceed the total sum of Three Million (\$3,000,000) Dollars, and that the same has been duly registered in the name of the owner and such registration properly noted hereon.

AMERICAN FINANCE & TRUST COMPANY.

By

Registrar.

IN WHOSE NAME

DATE OF REGISTRY

REGISTERED

TRANSFER AGENT

Filed and recorded at request of H. Gray Jan. 22, 1902 at 9:00 A.M., in Book 6 of Miscellaneous Records at pages 45 to 62 inclusive.

STATE OF ARIZONA, }
COUNTY OF COCHISE. } ss.

I, Owen E. Murphy, County Recorder in and for the County and State aforesaid, DO HEREBY CERTIFY that I have compared the annexed and foregoing copy with the original Agreement between THE TOMBSTONE CONSOLIDATED MINES COMPANY, Ltd., and THE DEVELOPMENT COMPANY OF AMERICA, filed for record in my office on the 22nd day of Jan. 1902, at 9:00 A.M., and recorded in Book 6 of Miscellaneous records at pages 45 to 62 inclusive, and that the same is a full, true and correct copy of said original and of the whole thereof.

Given under my hand and seal of office this 26th day of August, A.D. 1912.

OWEN E. MURPHY

County Recorder.

RECORDER

[SEAL]

Cochise County, Arizona.

NOTE.—Exhibit B attached to Bill in Equity was copy of bond there sued upon, and is not included here.

EXHIBIT C (attached to Bill in Equity).

SCHEDULE OF REAL ESTATE BELONGING TO THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.

List of lots of land in the City of Tombstone, Cochise County, Arizona. The names preceding numbers of

lots being names of mining claims upon which said lots are situated:

GILDED AGE: Lots 17, 18, 19, 20, 21, 22, 23 and 24, in Block 6, part of lot 23, Block 5, being 40 feet off S. E. end.

WAY UP: Lots 17 to 24, inclusive, Block 8.

SILVERBELT: Lots 1, 2, 23 and 24 in Block 25.

SILVERBELT: Lots 2 to 9, inc., and 16 to 19, inc., in Block 24.

BANNER: Lot 1; lots 5 to 13, inc., and 16 to 20, inc., in Block 38.

BANNER: Lots 5 to 9 inc., Block 50.

BANNER: Lots 5 to 14, inc., and lots 19 and 20, in Block 51.

BANNER: Lots 4 to 24, inc., in Block 65.

EMPIRE: Lots 9, (part of), 10, 11, 12, 13, 14, 15 and 16, Block 8.

EMPIRE: Part of lot 15 and all of lots 16 to 22, both inclusive, in Block 23.

EMPIRE: Lots 1 to 9 inc., in Block 9.

EMPIRE: Part of lot 19, and all of lots 20, 21, 22 and 23 in Block 24.

VIZINA: Lots 1 to 10, inc., in Block S.

Lots 9 and 10 in Block 18.

Value of same, with improvements, said

to be \$25,000.00

List of mines and mining claims, located in Cochise County, Arizona, with book and page where patent is recorded, Deeds of Mines, and where patent is not recorded, or claims are not patented, where location

notice is recorded in Records of Mines, in the office of the County Recorder of Cochise County, Arizona.

ADDIE	Lot 61	Tran. Record of Mines, 421, Book 7; Tran. R. M. 1-490;
ALKEY	Lot 43	12 Deeds of Mines, 261;
ALTA	Lot 109	7 Deeds of Mines, 405;
AUNT SALLY		Tran. Records of Mines, 7-47 and Book 1, R. M. 523;
BANNER	Lot 185	15 Deeds of Mines, 386;
BON TON		Tran. Records of Mines, 1-209;
BOSS	Lot 191	14 Deeds Mines, 594;
BLUE MONEY	Lot 81	15 Deeds Mines, 458;
BUFFALO		32 R. M. 254;
BIG COMET		5 Records of Mines, 472;
BROTHER JONA- THAN	Lot 153	8 Deeds of Mines, at page 530;
BUCKSKIN		29 Records of Mines, 179;
C. O. D.	Lot 215	15 Deeds of Mines, 108;
COCOPAH	Lot 82	6 Deeds of Mines at page 440;
CONTENT	Lot 69	15 Deeds of Mines, 297;
CONTENTMENT	Lot 68	15 Deeds of Mines at page 300;
CONTACT	Lot 175	9 Deeds of Mines, p. 536;
CONTENTION	Lot 37	Tran. D. of M. 3-394;
CORNELL		22 Records of Mines, 471;
CHANCE	Lot 187	11 Deeds of Mines, 550;
CENTRAL		Tran. R. of M. 6-662;

DEFENSE	Lot 88	14 Deeds of Mines, 289;
EAST SIDE	Lot 89	14 Deeds of Mines, 272;
EAST SIDE NUMBER 2	Lot 124	14 Deeds of Mines, 278;
EMERALD	Lot 157	8 Deeds of Mines at page 600;
EMPIRE	Lot 46	11 Deeds of Mines, 76;
EXTACY	Lot 77	8 Deeds of Mines, 87;
ESCONDIDO		9 Records of Mines at page 205;
EULAH		5 Records of Mines, 272;
FLORA DORA		15 Records of Mines, 562;
FLORA MORRISON	Lot 74	8 Deeds of Mines at page 177;
FORTUNA		Tran. Rec. of Mines, 1-391;
FIRST SOUTH EXTENSION TOUGH-NUT		5 Deeds of Mines, 1;
GRAND CENTRAL	Lot 42	5 Deeds of Mines, 24;
GRAND DIPPER	Lot 148	8 Deeds of Mines at page 606;
GIRARD		5 Deeds of Mines, 1;
GILDED AGE	Lot 52	9 Deeds of Mines, 34;
GOODENOUGH	Lot 87	14 Deeds of Mines, 311;
HARD UP	Lot 120	Tran. Rec. of Mines, 1-260;
HAWKEYE		Tran. R. of M. 3-437 and 14 R. M. 52;
HERAL	Lot 83	15 Deeds of Mines, 261;
HEAD CENTER		Tran. R. of M. 1-249;
HORN SILVER		9 Records of Mines, 426;
HIDDEN TREASURE	Lot 172	11 Deeds of Mines, 556;

HOUGHTON		22 Records of Mines, 470;
LAST CHANCE		
#2	Lot 194	11 Deeds of Mines, 553;
LITTLE WONDER		Tran. R. of M. 3-436 and R. M. 52;
LUCKY CUSS	Lot 40	14 Deeds of Mines, 295;
LOWELL	Lot 189	12 Deeds of Mines, 615;
MAINE	Lot 154	8 Deeds of Mines, 540;
MAY FLOWER	Lot 190	15 Deeds of Mines, 360;
MEXICAN	Lot 176	9 Deeds of Mines, 541;
MICHIGAN		22 Records of Mines, 472;
MINERS DREAM		11 Records of Mines, 237;
MOONLIGHT	Lot 177	11 Deeds of Mines, 543;
McCANN		Tran. R. of M. 3-763;
NAUMKEAG	Lot 44	9 Deeds of Mines, 17;
NARROW GAUGE		12 Records of Mines, 137;
NORTH POINT	Lot 193	12 Deeds of Mines, 568;
NEW YEAR	Lot 58	9 Deeds of Mines, 260;
NORTH EXTEN- SION OF THE SULPHURET		1 Tran. Records of Mines, 415;
NINETY NINE		15 Records of Mines, 65;
OREGON		14 Records of Mines, 753;
OWL'S LAST HOOT		Tran. Records of Mines, 1- 260;
OWL'S NEST	Lot 97	14 Deeds of Mines, 319;
POOR X	Lot 66	4 Deeds of Mines, 3;
PROMPTER		1 Transcribed Records of Mines, 241;
PROTECTION		14 Records of Mines, 528;
REVENUE	Lot 159	11 Deeds of Mines, 24;

SHORTY	Lot 80	8 Deeds of Mines, 93;
SILVER BELT	Lot 186	15 Deeds of Mines, 382;
SILVER PLUME	Lot 65	9 Deeds of Mines, 497;
SILVER THREAD	Lot 183	11 Deeds of Mines, 564;
SAN RAFAEL		3 Tran. R. of M. 252;
SOUTHERN BELLE	Lot 199	1 Tran. Records of Mines, 275;
SOUTH EXTEN- SION OF THE GRAND CEN- TRAL		7 Deeds of Mines, 100;
SULPHURET	Lot 48	5 Deeds of Mines, 8;
SURVEY	Lot 95	14 Deeds of Mines, 304;
SURVEY	Lot 103	7 Deeds of Mines at page 334;
SYDNEY	Lot 139	1 Tr. Records Mines, 296;
SAN PEDRO		3 Tr. Records Mines, 731;
SOUTH EXTEN- SION OF THE SULPHURET		3 Tr. Records Mines, 780;
STANDARD	Lot 192	11 Deeds of Mines, 547;
TELEPHONE	Lot 214	15 Deeds of Mines, 103;
TRANQUILITY	Lot 49	3 Deeds of Mines, 563;
TRIBUTE	Lot 90	14 Deeds of Mines, 325;
TOUGHNUT	Lot 41	14 Deeds of Mines, 263;
TRIPLE EX	Lot 152	8 Deeds of Mines at page 536;
VERDE	Lot 204	12 Deeds of Mines 265;
VIZINA		Amended Tran. Records Mines, 2-616;
WAY UP	Lot 53	5 Deeds of Mines, 396;
WEDGE	Lot 123	14 Deeds of Mines, 258;

WEST SIDE	Lot 91	14 Deeds of Mines, 283;
YELLOW JACKET		Transcribed Records of Mines, 1-248.

NOTE. The Hawkeye and Little Wonder appear to be merged in one claim, amended location of which is of record Book 14 R. of M. at 52.

Also all that certain lot or parcel of land situate in the City of Tombstone, said County of Cochise, described as follows:

Commencing at the Southwest corner of Fremont and Fifth Streets in said City, and running thence Southerly along the West side line of said Fifth Street eighty feet; thence Westerly at right angles to said Fifth Street sixty feet to the Easterly side line of Lot No. 8, in Block No. 18, said City; thence Northerly along the Easterly side line of said lot 8, thirty feet; thence at right angles to said last named line Easterly sixteen feet; thence at right angles and parallel to said Fifth Street Northerly twenty feet to the Southwest corner of the adobe house situated on the West side of lot No. 9 of the aforesaid Block No. 18; and thence Northerly along the East side of said adobe house about 30 feet to the Southerly side line 44 feet to the place of beginning, being part of lots 9 and 10 in said Block 18, and the same premises which John Reilly of said City, by his deed bearing date the 17th day of April, 1895, and recorded in the Recorder's Office at said City of Tombstone, on May 3, 1895, in Book 12, Deeds of Real Estate, page 91, granted and conveyed to the Tombstone Mill and Mining Com-

pany, all courses and distances being the same, more or less.

Also that portion of the Mexican grant of land known as San Juan de las Boquillas y Nogales on the San Pedro River in the said County upon which is built and situated the quartz mill of the Grand Central Mining Company with a frontage of 40 rods on said river on either side, Northerly and Southerly of said quartz mill, and running Easterly from in a river to the Easterly boundary of said grant, that is 80 rods frontage on said river, and running with the same width Easterly to the Eastern boundary line of said grant, with the said quartz mill in its entire Eastern and Western line.

Also commencing on the South side of Fremont Street in said City of Tombstone, at the Northeast corner of Lot No. 8, of Block 18 and running thence South along the East line of said lot 8, 50 feet; thence at right angles East 16 feet; thence at right angles North 50 feet to the South side of said Fremont Street; thence West along said South line 16 feet to the place of beginning, being the Westerly 16 feet front by 50 feet deep of lot 9 of Block 18 of said City of Tombstone.

All of the foregoing described mining claims, and tracts of property, with the improvements and buildings on the same (exclusive of the E. B. Gage house, which is owned by the Development Company of America), said to be valued at . . . \$1,000,000.00

EXHIBIT D (attached to Bill in Equity).

SCHEDULE OF PERSONAL PROPERTY BELONGING TO THE
TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.

Machinery and equipment at pump shaft
including steam plant, hoisting ma-
chinery, compressed air plant, electric
light plant, machine shop, carpenter
shop, blacksmith shop, with tools and
machinery complete for general mine
and repair work; also pumps and piping
in pump shaft and extra pumps on sur-
face for tracks, oil and water tanks,
etc., said to be valued at \$250,000.00

Hoisting machinery and boilers at follow-
ing shafts and values:

West Side	7,200.00
Tribute	2,000.00
Silver Thread	7,200.00
Tranquility	3,600.00
Lucky Cuss	6,000.00
Silver Plume	6,000.00
Comet	2,700.00
State of Maine	1,000.00
Oregon	350.00
Defense	1,000.00
Forty stamp mill, etc..	50,000.00
Railway equipment and trackage includ- ing one 16-ton Davenport saddle tank locomotive, and three 10-ton bottom dump carts, said to be worth	30,000.00

Office fixtures	\$500.00
Surveying instruments and equipment .	500.00
Assaying apparatus and supplies	750.00
Warehouse stock in warehouse or stored near pump shaft consisting of hardware, tools, pipe and fittings, nails, lumber, and general mine supplies	15,000.00
Fuel Oil on hand	3,000.00
	<hr/>
Total	\$386,800.00

All of the above property (personal) is located upon the land of said corporation hereinbefore set forth and all the above values are stated upon information and belief.

United States
Circuit Court of Appeals
For the Ninth Circuit

THOMAS W. SYNNOTT, a Creditor, Individually, and as the
Duly Authorized Attorney for, and Agent of ALEX-
ANDER SEDGWICK and MERRILL K. GREEN,

Appellant,

VS.

THE TOMBSTONE CONSOLIDATED MINES COMPANY,
LIMITED, Bankrupt, and A. L. GROW, as Trustee in
Bankruptcy of THE TOMBSTONE CONSOLIDATED
MINES COMPANY, Bankrupt,

Appellees.

Brief of Appellee

EVERETT E. ELLINWOOD,
JOHN M. ROSS,

Attorneys for A. L. Grow, Trustee, Appellee.

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

THOMAS W. SYNNOTT, a Creditor, Individually, and as the Duly Authorized Attorney for, and Agent of ALEXANDER SEDGWICK and MERRILL K. GREEN,

Appellant,

vs.

THE TOMBSTONE CONSOLIDATED MINES COMPANY, LIMITED, Bankrupt, and A. L. GROW, as Trustee in Bankruptcy of THE TOMBSTONE CONSOLIDATED MINES COMPANY, Bankrupt,

Appellees.

**APPELLEE'S
BRIEF**

The remarkable "Special Contract Bond" upon which Appellant bases his proof of claim has been so clearly and admirably dissected by the Honorable District Court that we might well rest upon its statement of the matter, which is wholly unanswerable. Considering the instrument as a whole and "reading each clause in the light of its context and evident relation to the other parts of the instrument" the learned Court notes:

FIRST: "A careful reading and study of the instrument will disclose no provision from which may be inferred an intent to create a general lien on the assets of the min-

ing company as security for its payment. On the contrary, the whole tenor of the instrument is that the lien intended to be created was one that should be limited to the surplus earnings of the Company." (Tr. p. 21.)

SECOND: "There is no definite promise of payment of either interest or principal expressed in the bond." (Tr. p. 22.)

THIRD: "Unless a new and different contract from that expressed be read into the bond, there is insufficient warrant for holding that the instrument permits the holders of these bonds to assert rights to the prejudice of the general creditors." (Tr. p. 23.)

Each of Appellant's contention on this appeal is fully and conclusively answered when measured by the three propositions thus stated by the District Court. No construction or interpretation of this instrument can, without violating its express provisions, give Appellant the status of a lien creditor, or convert the instrument into a definite promise to pay anything. The construction contended for by Appellant amounts simply to this: that these alleged bonds which when issued purported to create a contingent lien only upon the surplus earnings of a going concern have now, through the bankruptcy of the Company, become fixed and matured obligations secured by a lien upon the bankrupt's property which takes precedence over upwards of Two Million Dollars (\$2,000,000) of allowed and unsecured claims.

Under this construction, it is clear that, so long as the company kept out of bankruptcy, the obligation of these bonds, being restricted to surplus earnings, was subsequent to the claims of these creditors, who might then have brought suits upon their several claims, reduced them to judgments and satisfied their judgments, notwithstanding these bonds, out of the identical property

now claimed to be burdened by the alleged lien of these bondholders. Thus, by virtue of bankruptcy, these bonds acquire an entirely new and vastly more favorable status, a status which they are not claimed to have enjoyed before the petition in bankruptcy was filed, which is consequent solely upon the filing of such petition and is magically created thereby. The filing of the petition which is so often referred to as a caveat, or attachment against the whole world, irrevocably crystallizing the status of all persons interested in the estate, is thus made to work an instantaneous and kaleidoscopic change, wiping out the priority of unsecured creditors and casting them behind a Three Million Dollar (\$3,000,000) issue of bonds, theretofore floating in the clouds and restricted to such satisfaction as might be afforded by surplus earnings, but now become a first lien upon the corpus of the estate. We submit that:

I.

THE CLAIM PRESENTED IS NOT PROVABLE IN BANKRUPTCY.

The vice of Appellant's contention is obvious. He ignores the elementary rule that the provability of a claim in bankruptcy depends upon its status at the time the petition in bankruptcy is filed.

Bankruptcy Act, Sec. 63.

Collier on Bankruptcy, 8th Ed. p. 701; 9th Ed., p. 854.

In re Neff, 157 Fed., 57.

In order to be provable, the debt upon which the claim is founded must be a *fixed liability absolutely owing* at the time the petition is filed.

Collier on Bankruptcy, 8th Ed., p. 706; 9th Ed., p. 854, 867.

County Commissioners v. Hurley, 169 Fed., 22.

In re Adams, 130 Fed., 381.

It is clear that these bonds were not secured by any lien, except possibly upon surplus earnings, at or prior to the filing of the petition in bankruptcy. They were not promissory notes, because no definite time for payment is anywhere expressed or implied therein. In other words, they were not then fixed liabilities absolutely owing, but were then contingent liabilities contingently owing. They were then owing only upon the contingency that the earnings of the company should permit the creation and maintenance of the Interest and Retirement Funds mentioned in the bonds. The company might operate indefinitely, pay its debts and never be able to create the contemplated Retirement or Interest Funds. Or, it might maintain the Interest Fund, pay four per cent to its stockholders and never be able to create the Retirement Fund. Therefore, the contingency mentioned was one which might never arise. A claim based upon such a contingency clearly is not provable.

In re Hartman, 166 Fed., 776.

By the terms of the bond, the par value thereof is payable in twenty equal installments "represented by the attached coupons from and out of a RETIREMENT FUND created from the net surplus earnings of the company, as hereinafter stipulated, at the times and upon the terms and conditions hereinafter stated, *but not otherwise.*" The company "agrees to pay to the registered holder hereof in like gold coin from an INTEREST FUND created from the net surplus earnings of the company as hereinafter stipulated, *and not otherwise*, interest on the face value of this bond, or so much thereof as may from time to time remain unpaid, at the rate of six per centum (6%) per annum, payable semi-annually". Reference is then made to the back of the bond for "the terms and conditions governing the payment of this bond, and the payment of the installment coupons hereto attached, and the interest there-

on". Annexed to each bond, are twenty (20) "Installment Coupons", each representing "one-twentieth of the principal" of the bond, to which it is annexed. This coupon sets forth that it will be paid "from the Retirement Fund of said company created in the manner and applicable to the payment hereof as per the terms and conditions stipulated in the attached bond *and not otherwise.*"

It is to the face of the bond and coupons one would naturally look to ascertain the *obligations* of the bond. It appears therefrom, clearly, positively and repeatedly that the bondholder has recourse only to the Retirement Fund, and the Interest Fund to be created out of the net surplus earnings of the company, and not otherwise. The bond specifies no period or date of maturity for the bonds or coupons.

On the back of the bond are set forth the terms and conditions subject to which it is issued by the company, and accepted by the purchaser. Clause I governs the company in the application and use of the money derived from the sale of the bonds. Clause II requires the company out of its earnings to create and maintain several funds described as follows:—

(a) AN OPERATING FUND for carrying on the current business of the company.

(b) AN INTEREST FUND to take care of the interest on the bonds, as to which it is expressly agreed and understood that no payment of interest is promised, or shall be made, except from and out of the INTEREST FUND in this clause named, and that said fund shall be created and maintained solely from the surplus earnings of the company as herein set forth, and not otherwise.

(c) A RETIREMENT FUND "*from which* shall be paid from time to time the installment coupons * * * * * to which shall be transferred all net surplus earnings of the

company not required for the creation and maintenance of the special funds hereinbefore named, or the payment of dividends upon the stock of the company, which stock dividends shall not be accumulative and shall not exceed four per centum per annum until such time as all bonds issued by the company shall have been paid and redeemed."

Clause III specifies the application to be made of the earnings of the company. It is therein provided that the earnings "shall be used, paid and applied for the following purposes, *but only in the order herein in this clause stated.*"

First, it is required that the current expenses of the company shall be paid or provided for, and the Operating Fund kept as nearly unimpaired as the earnings of the company will permit. Second, the earnings yet remaining must be applied to the payment of interest installments on the bonds, and to keep the Interest Fund as nearly unimpaired as the earnings will permit. No dividends shall be paid upon the stock of the company while it is in default as to the interest on bonds. Third, the earnings yet remaining may be applied to the payment of the dividend on the stock of the company. Finally, it is provided that all the earnings of the company then remaining shall be transferred to the Retirement Fund.

Clause V, provides that in the event of liquidation or dissolution of the company, the bonds shall be paid "before any distribution is made of any of the assets of the company to the holders of the stock of the company."

Clause VI, disables the company to "execute, sign or deliver any mortgage, deed of trust, conveyance, lease, release, or waiver, or other instrument which shall, *subject to the terms and conditions of this agreement*, be prior to, or in any way, give a preference as against, or over, the rights" of the bondholders. By the terms of Clause VII, "it is expressly agreed and understood by the holder of this

bond, that the *obligation hereby created* is solely against the company as such, and *is only against the Retirement Fund* created from the surplus earnings of the company as hereinbefore stipulated. Provided, that in the event of liquidation or dissolution of the company, *the obligations of this bond* shall immediately extend and attach to all the funds and other assets of the company whatsoever, as in Clause V of this instrument above stipulated and set forth. The company further covenants and agrees that the total bonds of this issue outstanding at any time and as a unit shall be deemed and taken, *subject to, and in accordance with the conditions hereinbefore set forth* to control the title to all the property of the company, real and personal, etc.

We submit that it is perfectly clear that these bonds could not in any event be payable out of anything excepting the net surplus earnings of the company after the application thereof as required by the bond. This is constantly reiterated in the bonds and the coupons. The provision of Clause V, that in the event of liquidation or dissolution, the bonds shall be paid before any distribution of the company assets is made to the stockholders, is entirely consistent with the earlier provisions that dividends shall not be paid upon the stock while the company is in default as to the interest, but that such dividends not exceeding four per centum (4%) may be paid while the company is not in such default and before anything is set apart to retire the principal of the bonds.

Clause VI must be construed merely as disabling the company to execute any instrument which would create a prior claim or lien upon the net earnings of the company which might otherwise be applicable to the retirement of the bonds, or the payment of the interest thereon. The provision in Clause VII, that in the event of liquidation or dissolution, the *obligations* of the bonds shall extend and at-

tach to all the funds and assets of the company, must be interpreted in full view of the nature of those obligations, which as we have seen, are clearly restricted to the net earnings. When the company covenants that the bonds shall control the title to the company's property, subject to, and in accordance with the conditions set forth in the bonds, it absolutely negatives the idea contended for by petitioners, that in such event the bonds should be payable out of the property itself, because such method of payment would not be in accordance with the conditions set forth in the bonds.

Assuming as we must in this proceeding, that the company is insolvent, it is clear that the bondholders can have no relief under the provisions of Clause V, giving them a priority over the stockholders. In order to have any standing whatever, petitioners should aver that Interest and Retirement Funds were created, and that something remains therein which may be properly applied to the payment of the bonds. They must aver that there were net earnings which should be applied to their relief. Such averments could not avail them anything in this proceeding, but under the terms of the bonds, they would doubtless have a right by proper action, to have it judicially determined whether there are any funds which might properly be applied to the payment of their bonds.

Morse v. Bay City Gas Co., 91 Fed., 938.

Edwards v. Bay City Gas Co., 91 Fed., 946.

St. John v. Erie Ry. Co., 89 U. S., 136; 22 L. Ed., 743, 746.

From all of the foregoing, it is apparent that at or before the commencement of bankruptcy proceedings, a holder of one of these bonds could not have maintained an action for its collection out of the corpus of the company's property. The only conceivable remedy would have been a suit for the proper application of any net earnings of the company as

required by the bonds. Manifestly, a bondholder would not have been qualified to institute these bankruptcy proceedings against the company, since his claim was not then a fixed liability absolutely owing. Necessarily, then, this claim is not provable in bankruptcy.

II.

THE BONDS ARE NOT SECURED CLAIMS BUT ARE NOTHING MORE THAN A SPECIES OF PRE- FERRED STOCK.

Since it is clear that Appellant does not present a provable claim, further discussion of his status becomes somewhat academic. His claim to security rests upon the following conclusion of law contained in his proof of claim:

“and that the only security held by the deponent or his principals for said debt is the following: Said 461 Special Contract Bonds which consist of a first lien on all of the assets of said bankrupt estate, subject to the right of other bondholders to participate in the same” (Tr. p. 7).

Upon this basis, Appellant urged in the District Court that his claim should be allowed as a secured claim. Nothing is shown to render such alleged security valid as against the Trustee. Formerly, a Trustee stepped into the shoes of the bankrupt and could avoid no claim which was good against the bankrupt. But, under the Bankruptcy Act as amended in 1910 the Trustee is “vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon”, and as to property not in the custody of the bankruptcy court is “vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.”

Bankruptcy Act, Sec. 47.

Under this amendment, the alleged security would not be

good against the Trustee herein, unless it would also be good against an attaching or judgment creditor.

In re Hartdagen, 189 Fed., 546.

In re Gehris-Herbine Co., 188 Fed., 502.

Manifestly, the bond here presented would not be recordable under Paragraphs 748, 749 and 753, Revised Statutes of Arizona, 1901, reading as follows:

748. (Sec. 28.) "The following instruments of writing, *which shall have been acknowledged* according to law, are authorized to be recorded, viz: all deeds, mortgages, conveyances, deeds of trust, bonds for title, covenants, defeasances or other instruments of writing concerning any lands and tenements, or goods and chattels, or movable property of any description."

749. (Sec. 29.) "All bargains, sales and other conveyances whatever, of any lands, tenements and hereditaments, whether they be made for passing any estate of freehold or inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing, and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, *unless they shall be acknowledged* and filed with the recorder, to be recorder, as required by law, or where record is not required, deposited and filed with the recorder; but the same, as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof, or without valuable consideration, shall nevertheless be valid and binding."

753. (Sec. 33.) "The record of any grant, deed or instrument of writing authorized or required to be recorded, *which shall have been duly acknowledged* for record and duly recorded in the proper county, shall be

taken and held as notice to all persons of the existence of such grant, deed or instrument."

The bond here presented, not being acknowledged, would not be recordable under these sections, even if it were otherwise recordable. Nor is it claimed in Appellant's proof of claim that the bond, or any evidence thereof was recorded as required by law. Consequently, it could have no validity against the Trustee in Bankruptcy under the amended Bankruptcy Act.

The bond bears a strong analogy to a species of cumulative preferred stock. This appears in the provision entitling the stockholders to four per cent (4%) dividends before any part of earnings shall go into the Retirement Fund and in the further provision giving the bondholders priority over the stockholders upon liquidation or dissolution. The bond provides that the proceeds of the bond issue shall be devoted to purposes whereby they would become a *part of the capital of the company*. But where a preferred stock certificate provided that it should be "a preferred lien on the assets of the company" it was held:

"But these words are to be construed along with the entire instrument, and it is manifest from the whole paper that the corporation never intended to place the petitioner in the position of a creditor, but only to give her and like stockholders a preferred lien on the assets of the corporation, when in liquidation, over the common stockholders."

Wearer Power Co. v. Elk Mountain Mill Co., 69 S. E., 747, 748.

As pointed out in *Hamlin v. R. R.*, 76 Fed., 664.

"It is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of reimbursing the principal of the capital stock until the debts of the corporation are paid."

See also, *Hamlin v. Toledo, etc., R. R.*, 95 Fed., 497, 530.

Appellant's contention here is in violation of this fundamental principle, and if upheld, would withdraw the capital of the bankrupt from administration in bankruptcy for the benefit of its creditors. But the bankrupt's capital is a trust fund for the benefit of these creditors, who are entitled to have their debts paid therefrom before any distribution thereof, is made to the stockholders or alleged bond holders.

Jones on Insolvent and Failing Corporations, page 766.

III.

APPELLANT'S PROOF OF CLAIM IS INSUFFICIENT

It is important to the administration of this estate that the status of these bonds be finally determined, and we therefore do not desire to prevent such determination, but in presenting the matter upon the whole record, we suggest the obvious and fatal failure of Appellant in his proof of claim to state the consideration upon which it is based.

In re Coventry-Evans F. Co., 166 Fed., 516.

In re Stevens, 104 Fed., 325; 107 Fed., 243.

Since preparing the foregoing, we are in receipt of Appellant's Brief, to which we shall briefly advert:

By way of an appendix to his brief, Appellant seeks to introduce into the record on this appeal, matters which are wholly extraneous thereto, and are not referred to, or in any degree supported by the record. This record was made by Appellant. It was prepared in accordance with his praecipe (Tr. p. 33), wherein he must be taken to have indicated the record upon which he desired this appeal to be heard. No proper proceeding is now taken or suggested for the purpose of bringing up from the lower court any

additional matters of record. It does not appear that the matters included in the appendix were ever, or are now, a part of the record of this proceeding, either before the Referee or the District Court. On the contrary, the bill in equity (Appellant's Br. pp. 40 et seq.) was verified December 12, 1912 (Appellant's Br. p. 51), and therefore must have been filed some four months after the order herein appealed from was entered by the Referee, that order being dated August 8, 1912, (Tr. p. 3). We confess our astonishment therefore, that this bill in equity should be brought forward as having any bearing upon the correctness of the Referee's order, which is the only question presented upon this appeal. We do not understand that it is the practice of this, or any other court, on appeal to permit such unauthenticated and informal additions to the record, or to determine an appeal upon anything else than the record actually presented. Only matters of record will be considered.

Ross v. Stroh, 165 Fed., 628.

In re O'Connell, 137 Fed., 838.

Suggestion is made that Appellant has consistently taken the position that he should be permitted to offer parole evidence in support of his proof of claim (Appellant's Br. p. 33), but that he has been denied the opportunity to do so. We respectfully suggest that the record does not in any degree support this statement.

The minute entries of the District Court (Tr. pp. 14 et seq.) do not bear out the statement. The proof of claim upon which Appellant relies made no suggestion of his desire to offer parole proof; nor is there an assignment of error in relation to any refusal of the Referee or District Court to receive such proof. It is stated that the District Court refused Appellant's request that the determination of this appeal should be delayed until the hearing of the alleged suit in equity. Nothing in the record supports this contention, but conceding that such a request was made, it

should be borne in mind that this matter was then before the District Court, not as an original proceeding, but as a proceeding to review the order of the Referee disallowing Appellant's proof of claim. It would be strange indeed if the District Court should delay the orderly and prompt disposition of bankruptcy matters pending before it on appeal upon the *ex parte* suggestion that a suit had been filed entirely outside of the bankruptcy proceedings, upon the hearing of which certain evidence might be introduced, which was not before the Referee, but which might be considered by the court to have some bearing upon its disposition of the pending appeal.

Appellant even goes so far as to attempt an outline of certain alleged evidence which may hereafter be presented in the suit in equity (Appellant's Br. p. 36). In the course of this outline, it is urged that the general creditors whose claims have been allowed in this proceeding, aggregating upwards of Two Million Five Hundred Thousand Dollars (\$2,500,000) are the persons who brought about the sale of these bonds, and that they are estopped to question the priority of the bonds over the unsecured claims. In this manner, a plea of estoppel is sought to be presented for the first time in this court, based upon unsupported statements of matters wholly outside of the record, and which have never been, and which are not now, relevant to any question presented upon this appeal. It is difficult temperately to characterize Appellant's gratuitous and wholly unfounded charge that the unsecured creditors have been guilty of some species of fraud or misrepresentation in the sale of these bonds (Appellant's Br. p. 37). If the truth or falsity of these charges were now a relevant matter, we would not hesitate to controvert these statements in the terms which they deserve, but we do not consider that this court would care to enter upon the consideration of such a controversy on this proceeding. Appellant mentions only five of the

large number of creditors whose claims have been proven and allowed in these proceedings (Appellant's Br. p. 37). It is manifest that the lower court is open for any proper complaints as to the allowance of any of the claims which have heretofore been proven and allowed in this proceeding. If there is any disposition on the part of anyone to question the correctness of any of these claims, he should make his complaint to the Referee having this matter in charge, and not attempt to suggest it for the first time upon the consideration of an appeal in this court.

As stated by Appellant, The Tombstone Consolidated Mines Company, Limited, was adjudicated bankrupt August 10, 1911. Appellant's proof of claim was filed August 8, 1912, three days before the expiration of the year within which claims might be filed against the estate. While Appellant was wholly within his rights in thus delaying the presentation of his claim, the result of the pendency of these proceedings to determine the status of these bonds has been to delay the closing of the estate in bankruptcy, and to postpone the distribution of the estate among the unsecured creditors to whom it properly should go.

The suit in equity, filed some five months after Appellant's right to prove his claim in bankruptcy, is still pending. No reason appears why this suit should not have been filed much earlier than it was. At all times since the adjudication in bankruptcy herein, and for a long time prior thereto, Appellant was in no way prevented from taking such course as would protect his rights. If the suit in equity is the proper proceeding for this purpose, his rights may still be determined therein, and upon the hearing of that case, Appellant will doubtless have ample opportunity to bring forward such evidence as may be available in support of the allegations of his bill.

A fair inference to be drawn from the history of this proceeding as narrated by Appellant, is that by postponing the

presentation of his claim until almost the last moment within which it might be presented, and in delaying the institution of his suit in equity, Appellant has not been animated by a desire for a speedy administration of this estate in bankruptcy, but has rather been actuated by a desire to keep the matter in court as long as possible.

In his statement of the case, Appellant says,

“It appears that on July 16, 1901, the bankrupt entered into a contract with the Development Company of America * * * * * This contract and a copy of bonds were duly filed and recorded on January 22, 1902, in the office of the County Recorder for the County of Cochise, in the State of Arizona, in Book 6 of Miscellaneous Records, at pages 45-62 inclusive.” (Appellant’s Br. p. 3.)

In preparing his proof of claim in this case, Appellant did not see fit to incorporate any of these facts, if facts they are, and we now suggest that there is no support in the record for any of the foregoing statement. No reason appears why Appellant should not have raised these questions in the Lower Court and before the Referee. Whereupon, the questions then arising, might have been given proper consideration, and it could have been ascertained what, if anything, had been filed for record, whether it was duly or properly acknowledged and whether it was a recordable instrument. Upon this appeal however, we earnestly insist that this court should determine the matter upon the record presented, leaving it to Appellant hereafter to raise and determine such matters as may be relevant in the equity suit. If, as Appellant seems to apprehend, the suit in equity was filed too late, it is not apparent that this court is now able to accord him any relief, or that the Trustee in Bankruptcy, or any of the unsecured creditors are at all responsible for Appellant’s delay in attempting to find a remedy for his alleged rights.

Appellant urges that the position taken here by the Trustee is astounding, because no one would have purchased these bonds if they were to be paid only from income. (Appellant's Br. p. 31.) The bonds amply show the purpose for which they were sold, namely, for the purpose of securing the capital with which to purchase mining properties, construct a railroad, install the necessary mining machinery and equipment, and operate the property (Appellant's Br. p. 62). That is to say: These bonds were sold for the purpose of procuring capital for the company. Their proceeds became a part of the company's capital; and the essence of Appellant's attempt here is to withdraw his contributions to capital to the detriment of the unsecured creditors who, under the terms of the bond were intended to be paid before the bondholders could get anything. If Appellant had so far developed his outline of the evidence (Appellant's Br. p. 36) as to show the entire facts of the transaction, it would be understood why it might be easy to dispose of these bonds, and thus secure the necessary capital, by assuring the purchasers thereof that their contributions to capital should be returned to them before anything should ever go upon liquidation of the company to those stockholders who should not be bondholders.

Attempting to interpret these bonds (Appellant's Br. pp. 27 et seq.) Appellant adopts a line of reasoning by which the bonds should not be construed as a whole, but should be interpreted by reference exclusively to certain isolated portions of the bond upon the theory that since these isolated portions do not include all of the contract expressed elsewhere in the bond, they should be held to be entirely controlling. But Appellant finds it necessary to go even beyond this line of reasoning, when he makes the following quotation from the bond (Appellant's Br. p. 22):

"The bond of this issue outstanding at any time and as a unit shall be deemed and taken * * * * to con-

trol the title to all of the property of the company, et cetera".

Thus omitting from this quotation, the controlling language thereof, which follows the word "taken", namely:

"Subject to, and in accordance with the conditions hereinbefore set forth."

It is suggested that our interpretation of these bonds leads to "the most unreasonable sophistry", and is only consistent with the theory that these bonds were issued in the pursuance of some fraudulent scheme (Appellant's Br. p. 27); to which we reply, that we merely construe these bonds according to their own expression, for the adoption of which we were in no wise responsible. If they were so drawn as to keep the word of promise to the ear, but break it to the hope, as is suggested by Appellant, we can only say that the Trustee herein takes the bonds as they are and asks that they be interpreted accordingly.

Appellant makes the naive suggestion that the Referee should have suspended his claim "pending the determination of the value of the security in some proper tribunal", or should have proceeded to determine the value of the security himself. (Appellant's Br. p. 26.) Since the bondholders' security consists of all of the property of the bankrupt, if they have any security at all, it is not necessary to determine the value of that security. If such security exists, the unsecured creditors get nothing.

In an attempt to read into these bonds a definite promise to pay, Appellant cites many cases to the effect that where a breach of contract results from a party's bankruptcy, the other party may liquidate his claim for damages, and prove it in the bankruptcy proceedings.

In re Swift, 112 Fed., 315.

In re Neff, 157 Fed., 57.

In re National Wire Co., 166 Fed., 631.

In re Duquesne Incandescent Light Co., 176 Fed., 785.

In all of these cases there appeared an absolute obligation, not contingent in any respect, but which the bankrupt failed to completely perform before bankruptcy. Of course, an elementary rule in bankruptcy permits the liquidation of the claim for damages for breach of contract if the Trustee does not elect to complete it. But Appellant is not here claiming damages for breach of contract. It is suggested that the bond imports an obligation of the bankrupt to continue operations and pay the bonds out of profits. This is far-fetched indeed. But it is not claimed that the bankrupt was at fault in failing to operate at a profit. No claim for damages for such default is suggested. If it were, the court might be called upon to attempt to determine how much might possibly have been realized for the bondholders by continued operations—an impossible problem. Appellant, on the contrary, claims the principal sum of the bonds with interest, as a fixed liability matured by bankruptcy. In other words, he asks the court to give him all of the relief to which he would have been entitled had the bankrupt's operations proven all of the success of which its promoters dreamed. For the purposes of his relief, this bankrupt must be deemed to have made enough profits to pay the bonds, but the unsecured creditors, who, by the terms of the bonds, were to be paid before any profits were applied upon the bonds, must now step aside and give the bondholders, not merely the imaginary profits, but the entire property of the bankrupt. We submit that Appellant's contention quickly reduces to an absurdity, and is wholly untenable, and that his citations of decisions concerning anticipatory breaches of contract and breaches arising where a party puts it beyond his power to perform are wholly beside the point here involved. These citations also include:

Lovell v. St. Louis Mut. L. Ins. Co., 101 U. S., 264.

Ruehm v. Harts, 178 U. S., 14.

Reduced to its simplest terms, Appellant's contention is that by these bonds the bankrupt bound itself at all events to operate at sufficient profit to pay: (1) the expenses of operation, (2) the interest on the bonds, (3) four (4%) per cent dividends to its stockholders, and (4) the principal of the bonds, and since it went into bankruptcy it thereby broke its contract and became liable to pay these bonds with all of its property to the exclusion of its creditors:

Appellant states:

"The fifth paragraph of the bonds, expressly states that in the event of liquidation or dissolution of the company all bonds with interest shall be paid before any distribution." (Appellant's Brief, p. 16.)

By adding the qualifying words "is made of any of the assets of the company to the holders of the stock of the company", the full meaning of clause V is apparent.

This clause V and other clauses, particularly clause VII, is much relied on as showing an equitable mortgage. In support of this theory, Appellant cites numerous cases wherein the most absolute showing of a fixed and secured obligation to pay appeared.

See: *Burt v. Rattle*, 31 Oh. St., 116, where a definite obligation with a fixed time for payment was secured by a bond and mortgage to a Trustee which was recorded as a realty mortgage, and filed as a chattel mortgage;

Heller v. National Marine Bank (Md. 1899), 45 L. R. A., 438, where the statute expressly provided that the preferred stock in question should be "a lien on the franchises and property of such corporation, and have priority over any subsequently created mortgage or other incumbrance", and where the legal requirements as to recording were fully complied with;

In re Peasley, 137 Fed., 190, where a vendee of land under a recorded contract for purchase, who had paid the pur-

chase price before bankruptcy was adjudged to have an equitable lien;

Stickel v. Atwood, 25 R. I., 456; 56 Atl., 687, where the bond presented was a "Ten Year Gold Bond" of the par value of One Hundred Dollars (\$100.00) a definite obligation with a fixed time of payment and the question was whether a recital that the bond "is secured by all of the property and assets of this company" could constitute a false representation, there being no security, a radically different question from that presented here and a radically different provision from that in the bond at bar that the bonds "as a unit shall be deemed and taken, subject to and in accordance with the conditions hereinbefore set forth, to control the title," etc. (Clause VII.)

The bond here presented will be searched in vain for any mention of "security" or "lien" or "mortgage". On the contrary, the obligation thereby created "is solely against the company as such, and is only against the Retirement Fund created from the surplus earnings of the company, as hereinbefore stipulated" (Clause VII.); it need only be paid "whenever a sufficient sum shall have accumulated in said Retirement Fund" (Clause III (C))—and upon liquidation or dissolution it is "the obligations of this bond" which "immediately extend and attach" to the company's property (Clause VII), and when we search the bond for those "obligations" we find that they require payment "out of a Retirement Fund, created from the net surplus earnings of the company as hereinafter stipulated, at the times and upon the terms and conditions hereinafter stated *but not otherwise.*"

Counsel are not far at sea when they detect traces of sophistry in the language of this remarkable instrument, but when they go outside the record to mention alleged representations under which these bonds were sold (Appellant's Br. p. 36), they again collide with Clause VIII recit-

ing that the bond is "authorized, sold, issued, purchased and accepted upon the terms and conditions hereinbefore stated and none other, and no officer, agent or other representative of the company shall have the power to waive or modify any provision or condition of this agreement, or to add any other provision or condition thereto."

As supporting the sufficiency of the proof of claim herein, Appellant cites *Baumhauer v. Austin*, 186 Fed., 260, wherein the sufficiency of the statement of consideration was not drawn in question, the statement was:

"That the consideration of said debt is as follows: Money loaned and advanced by the deponent at divers times to said W. C. Baumhauer evidenced by a certain promissory note, etc."

This does not touch the question presented here, wherein the Appellant's proof of claim states "that the consideration of said debt is as follows: four hundred and sixty-one (461) Special Contract Bonds". (Tr. p. 7.)

As supporting his contention that the Trustee, took subject to the claim of the bondholders, even though no evidence thereof was recorded as required by the statutes of Arizona, hereinabove quoted, Appellant cites *Arctic Ice Machine Co. v. Armstrong County Trust Co.*, 192 Fed., 114.

It does not appear in that case whether the conditional sale contract was recorded, or was required to be recorded under the laws of Pennsylvania; but the case does not seem to us to have been carefully considered or correctly decided in the event that the contract was required to be, but was not recorded. An unrecorded contract of this character would be good as against the vendee and creditors without a lien. By the amendment of the Bankruptcy Act of June 25, 1910, the Trustee was given the position of a creditor with a lien. Creditors who had no lien at the time of this amendment might thereafter acquire a lien before the contract was recorded, and such lien would undoubtedly be

good against the vendor. The effect of the amendment is merely to give the Trustee the status of a lien creditor, which he did not formerly have. It would be entirely consistent with the holding in that case under the assumption we have made, to hold that an existing creditor without a lien at the date of such unrecorded contract could not thereafter invalidate said contract as to himself, by securing an attachment lien. In other words, that he could not thereafter change his status to the prejudice of the vendor in the contract.

In re Hartdagen, 189 Fed., 546.

Two unrecorded conditional sale contracts made between September, 1900, and January, 1910, were held invalid as against the Trustee in Bankruptcy under the amendment of June 25, 1910, bankruptcy having intervened September 13, 1910, the court holding,

"This provision of the Bankruptcy Act puts the Trustee, in so far as the assets of the estate are concerned, in the position of a lien creditor."

We are unable to appreciate that upon the execution of the contract in the Arctic Ice Machine case, the vendor acquired such vested right as might prevent a general creditor from thereafter requiring the status of a lien creditor to his detriment.

We submit that the logical and correct rule in this connection is stated *In re Hammond*, 188 Fed., 1020, wherein it was held that the amendment of 1910 was fully effective as against a mortgage executed prior thereto; the court saying:

"At any time before or after the adoption of the amendment, any creditor by reducing his claim to judgment, and levying, or by suing out an attachment, could have defeated Fee's mortgage. At all times it was in peril of the individual action of Hammond's creditors in this way. The amendment of 1910 does nothing more under

these circumstances than to collectively put these creditors into the position of judgment or attaching creditors by representation. It simply offers another method of effecting a remedy against the mortgage which already existed in behalf of the creditors. * * * * * It seems to us that the amendment of 1910 very properly applies to this mortgage, and that as the law in its operation has the same practical effect as if the creditors of Hammond had severally levied, the appointment of the Trustee gives him priority."

It appears that the bankrupt has paid no interest whatever on the bonds here presented. For years the bondholders acquiesced in this failure without bringing any proceeding to determine whether or not they were entitled to any relief. The debts of the bankrupt accumulated until finally they aggregated upwards of Two Million Five Hundred Thousand Dollars (\$2,500,000). Bankruptcy resulted. An adjudication was had and a Trustee elected. Barely within the year following adjudication, Appellant herein, and many other bondholders proved their claims before the Referee. Having appealed without success to the Referee and the District Court, all of the bondholders excepting Appellant dropped the matter. (Transcript p. 23.) Some four months after their claims were disallowed, some of the bondholders filed their suit in equity, as stated by Appellant, wherein they seek a foreclosure of their alleged mortgage (Appellant's Br. p. 49).

It is evident that this remedy of foreclosure, if it has ever existed at all, has been open to the bondholders for years. But having elected to present his claim in bankruptcy upon such record and proof as he thought necessary, Appellant now seeks for the first time and in this court to supplement the record made by himself, and now found to be unsatisfactory. The long-delayed suit in equity is now sought to be tacked to this proceeding, and Appellant asks

that the determination of this proceeding be delayed to await the outcome of the suit in equity. He asks that the unsecured creditors shall be thus delayed in the enjoyment of their right to a speedy administration of this estate in bankruptcy, and seeks to go outside the record in order to charge them with some vague responsibility for the plight of the bondholders.

We respectfully urge that it would be harsh indeed to accord such treatment to these creditors or to the Trustee. Whatever equities appear in this proceeding, are those of the unsecured creditors. Upon the record it must be assumed that they became such creditors without notice of these bonds. But even if each creditor had carefully read this bond before extending credit to the bankrupt, we confidently urge that he would merely have been advised that the bondholders had certain claims against the surplus income of the bankrupt after operating expenses were paid, and would have been justified in considering the corpus of the bankrupt's large properties clear and unencumbered. This estate should be closed without further delay. It has been in the hands of the Trustee almost two years. We invoke therefore, the application of the rule already announced by this court:

"The bankruptcy law contemplates that the bankrupt's estate shall be administered with all convenient dispatch so that the property may be distributed among the creditors, and the bankrupt discharged from his debts, and to that end, parties litigant shall be alert and active to protect their rights, and to proceed with promptness in asserting the same."

Blanchard v. Ammons, 183 Fed., 556, 559.

Owing to the grave importance of this proceeding, we have perhaps given more attention to Appellant's contention than they warrant. We have refrained from following Appellant outside of the record for the purpose of attempt-

ing to try the equity suit at this time, but we cannot refrain from asserting that when that case shall be tried, Appellant will find it wholly impossible to substantiate the statements he now makes, either as to the alleged equities of the bondholders, or the alleged misdeeds of the general creditors. Nor can we believe those statements are now made with any confidence. They are made in a blind attempt to rest Appellant's case upon something else than the bonds themselves, and in the hope that this court may be sufficiently influenced by his suggestions *de hors* the record to assist Appellant in his evident purpose of indefinitely postponing the completion of this bankruptcy proceeding. But the Trustee stands here upon the language of the bond itself, and upon the record as made by Appellant himself, and, in closing, confidently urges that when the bond is read as a whole, "reading each clause in the light of its context and evident relation to the other parts of the instrument," as suggested by the learned District Judge, it will be found to contain no provision from which may be inferred an "intent to create a general lien on the assets of the mining company as security for its payment", or which imports "a definite promise of payment of either principal or interest".

We respectfully submit that the order appealed from should be affirmed.

Ellinwood & Bass
John Mason Bass
E. E. Ellinwood.

Attorneys for A. L. Grow, Trustee, Appellee.

No. 2263

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS W. SYNNOTT, a creditor, Individually,
and as the duly authorized attorney for, and
agent of ALEXANDER SEDGWICK and MERRILL
K. GREEN,

Appellant.

vs.

THE TOMBSTONE CONSOLIDATED MINES COM-
PANY, Limited, Bankrupt, and A. L. GROW,
as trustee in bankruptcy of the Tombstone
Consolidated Mines Company, Bankrupt,

Appellees.

PETITION FOR REHEARING ON BEHALF OF APPELLANT.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

The appellant in the above entitled cause respectfully petitions this Honorable Court to grant a re-

hearing of the above entitled cause upon the following grounds:

The question at issue in said cause and the merit of the contentions of the parties thereto, were not passed upon by this Honorable Court, as appears from the opinion of said Court filed on the 18th day of August, 1913, from which we quote the following:

“It appears therefrom that the appellant, on the 8th day of August, 1912, filed with the Referee in Bankruptcy on behalf of himself and others, a claim against the bankrupt based upon 461 special contract bonds of the face value of \$439,055, with interest thereon from the several dates of the bonds, which claim the referee disallowed on the ground that the instrument constituted contingent and not fixed liabilities of the bankrupt; that the appellant thereupon petitioned for a review of that decision of the referee by the Court below, which petition was granted, and that upon a hearing thereof, the Court took the same view of the bonds relied on by the appellant and affirmed the decision of the referee. It is from that decision of the Court that the present appeal was taken.

While the record before us contains the ‘Registered Name’, ‘Serial Nos.’ and ‘Face Value’ of the bonds, it contains nothing whatever concerning the terms, provisions, or conditions of the bonds.”

In connection therewith, the following facts are respectfully called to the attention of the Court, to wit: That on March 4, 1913, a stipulation was

entered into between the parties in the above entitled cause, providing that the special contract bond therein may be sent up on appeal, with the other papers herein, so as to obviate the necessity of making a complete copy thereof (see folio 33, page 30, Transcript on Appeal).

That pursuant to the above stipulation, the clerk of the District Court omitted making a copy of the bond for the Record on Appeal, but instead of said copy, and under instructions of the parties to the cause, said clerk sent up as part of said Transcript on Appeal the original bond, as appears from the certificate of said clerk of United States District Court (see Transcript of Record, page 35).

The bonds therefore referred to in the opinion of the Court as not being a part of the record on appeal, and hence not before the Court for consideration, were in point of fact received by the clerk of the United States Circuit Court of Appeals for the Ninth Circuit on the 31st day of March, 1913, and were on that date placed of record in the above entitled cause herein and were properly before the Court.

We respectfully invite the Court's attention to the certificate of the clerk of this Honorable Court as follows:

*“United States Circuit Court of Appeals for
the Ninth Circuit.*

Thomas W. Synnott, a creditor, etc.,	} No. 2263
Appellant,	
vs.	
The Tombstone Consolidated Mines	
Company, Limited, Bankrupt,	
et al.,	
Appellees.	

CERTIFICATE OF CLERK OF U. S. CIRCUIT COURT
OF APPEALS TO DATE OF RECEIPT OF CERTAIN
SPECIAL CONTRACT BONDS OF TOMBSTONE
CONSOLIDATED MINES COMPANY, ETC.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that Petitioner's Exhibits, viz.: 476 Special Contract Bonds of the Tombstone Consolidated Mines Company, were received by me from the Clerk of the District Court of the United States for the District of Arizona and placed of record in the above entitled cause in my office on the 31st day of March, A. D. 1913; and that the printed transcript of record in said cause was duly filed in my office on the 21st day of April, A. D. 1913; that the said cause was duly argued and submitted to said Circuit Court of Appeals for consideration and decision on the 13th day of May, A. D. 1913; and that an opinion was duly rendered and filed by the said Circuit Court of Appeals on the 18th day of August, A. D. 1913, in accordance with which opinion a decree was duly filed and entered affirming the judgment of the said District Court in said cause.

Attest my hand and the seal of the said United States Circuit Court of Appeals for the Ninth Circuit at the City and County of San Francisco, in the State of California, this 3rd day of September, A. D. 1913.

(Seal)

F. D. MONCKTON,
Clerk."

We also call the attention of the Court to the fact that a notation was made upon the calendar opposite the title of this cause directing the attention of this Honorable Court to the fact that the bonds referred to were on file with the clerk and were a part of the record for the consideration of the Court. Through mistake and inadvertance, in nowise attributable to appellant, the merits of the controversy were not examined into by this Honorable Court or passed upon in the opinion. Needless to say, the appellant in this very important cause is exceedingly anxious to obtain the judgment of this Court on the merits of the controversy, and hence this petition is most respectfully submitted.

ADAMS & BLINN,

AMOS L. TAYLOR,

DOAN & DOAN,

Counsel for Appellant and Petitioner.

THOMAS E. HAYDEN,

Of Counsel.

CERTIFICATE OF COUNSEL.

THOMAS E. HAYDEN, attorney at law, hereby certifies, that in his judgment the petition for rehearing is well founded in point of law and that said petition is not interposed for delay.

THOMAS E. HAYDEN,
Of Counsel for Appellant and Petitioner.

United States
Circuit Court of Appeals
For the Ninth Circuit.

POSTAL TELEGRAPH - CABLE COMPANY OF
WASHINGTON, a Corporation,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

FILED

JUL 1 - 1913

No. 2268

United States
Circuit Court of Appeals
For the Ninth Circuit.

POSTAL TELEGRAPH - CABLE COMPANY OF
WASHINGTON, a Corporation,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Assignment of Errors.....	123
Bill of Exceptions.....	28
Certificate of Clerk U. S. District Court to Transcript of Record, etc.....	145
Citation on Writ of Error (Copy).....	141
Citation on Writ of Error (Original).....	150
Cost Bond.....	137
Instructions..	102
Judgment.....	25
Memorandum of Costs and Disbursements to be Taxed in Favor of the Defendant and Against the Petitioner.....	20
Motion for a New Trial.....	22
Names and Addresses of Counsel.....	1
Notice and Summons.....	11
Notice of Appearance of Defendant, etc.....	13
Order Directing Impanelment of Jury to Ascertain and Determine Compensation, etc.....	14
Order Granting Writ of Error and Fixing Amount of Bond.....	135

Index.	Page
Order Overruling Plaintiff's Motion for New Trial	24
Order Settling Bill of Exceptions.....	120
Petition.....	2
Petition for Order Allowing Writ of Error.....	133
Petitioner's Exceptions to Instructions Given and Refused... ..	114
Petitioner's Exhibit No. 1 (Certificate of Postmaster-General of the Filing of the Acceptance by the Petitioner of the Provisions of the Post Road Acts of Congress to Apply to the Postal Telegraph-Cable Company)..	121
Rebuttal Evidence.....	97
Return on Service of Writ.....	12
Stipulation as to Record.....	143
TESTIMONY ON BEHALF OF PETITIONER:	
BLAKE, J. G.....	29
Cross-examination	35
Redirect Examination	42
COBBURN, E. (in Rebuttal)	97
FOREHAND, J. A.....	50
Cross-examination	54
Redirect Examination	59
LYNCH, J. J.....	59
Cross-examination	62
In Rebuttal	99
MIDDAUGH, HORACE	43
Cross-examination	46
Redirect Examination	49
Recross-examination	49

Index. Page

TESTIMONY ON BEHALF OF DEFEND-
ANT:

BENDER, W. E.....	70
Cross-examination	72
CRAVER, J. E.....	86
Cross-examination	91
Redirect Examination	95
Recross-examination	96
DILDINE, E. E.....	84
GALE, W. H.....	73
Cross-examination	75
Redirect Examination	77
Recross-examination	77
PERKINS, LOCKE M.....	62
Cross-examination	66
RHODES, R. J.....	78
Cross-examination	79
RIDELL, HERMAN	79
Cross-examination	81
SMITH, F. M.....	67
Cross-examination	70
SMITH, JOSEPH	85
WALSH, JOHN	82
Cross-examination	83
Verdict	19
Writ of Error (Copy).....	139
Writ of Error (Original).....	147

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

Names and Addresses of Counsel.

E. C. HUGHES, Esq., Attorney for Plaintiff in
Error,

661 Colman Block, Seattle, Washington.

MAURICE McMICKEN, Esq., Attorney for Plain-
tiff in Error,

661 Colman Block, Seattle, Washington.

WM. F. DOVELL, Esq., Attorney for Plaintiff in
Error,

661 Colman Block, Seattle, Washington.

H. J. RAMSEY, Esq., Attorney for Plaintiff in
Error,

661 Colman Block, Seattle, Washington.

C. H. WINDERS, Esq., Attorney for Defendant in
Error,

712-14 Lowman Building, Seattle, Wash-
ington.

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Petition.

Comes now the petitioner, Postal Telegraph-Cable Company of Washington, and avers:

I.

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, having its principal place of business at the city of Seattle, in the county of King, in said State, and is a citizen and resident thereof, and that said petitioner has paid the annual license fee last due to the said State of Washington.

II.

That the defendant, the Northern Pacific Railway Company, is a corporation duly organized and existing under the laws of the State of Wisconsin, and is a citizen and resident of said State, and that it has duly complied with the laws of the State of Washington in respect to foreign corporations to

entitle it to transact its business as a railway company within said State of Washington. [1*]

III.

That the said defendant, Northern Pacific Railway Company, owns and operates a railway from the city of Seattle, in the county of King, extending northerly through the counties of King, Snohomish, Skagit and Whatcom, to the boundary line between the State of Washington and the Province of British Columbia, in the Dominion of Canada, which boundary line is at the northerly end of its depot building, in the town of Sumas, in said county of Whatcom, and which said railway, proceeding northerly from the city of Seattle, passes through the town of Bothell, in the county of King, through the towns of Snohomish and Getchell, in the county of Snohomish, through the town of Sedro Woolley, in the county of Skagit, and thence through the county of Whatcom to the northerly limits of the town of Sumas, at the international boundary line aforesaid. And said railway company is likewise the owner of a right of way extending about fifty (50) feet on each side of the center line of its said railroad, from its initial point in the city of Seattle to its terminus at the said international boundary line at Sumas.

IV.

That the petitioner Postal Telegraph-Cable Company of Washington is engaged in the telegraph business, with connecting telegraph lines throughout the United States of America and the Dominion of Canada, and with cable connections throughout the world, and now owns and operates, among other tele-

*Page-number appearing at foot of page of original certified Record.

graph lines, a line of telegraph poles and wires along, upon, over and across the said right of way of the defendant, the Northern Pacific Railway Company, beginning at the intersection of Evanston Street with said right of way, near Fremont station, in the city of Seattle, and continuing thence [2] northerly along and upon said right of way throughout the entire length thereof to the said international boundary line at the north end of the depot building, in the town of Sumas aforesaid.

V.

That said telegraph line was constructed and has at all times since its construction been maintained under and by virtue of a written contract, entered into by and between the predecessors in interest of this petitioner and of the defendant Northern Pacific Railway Company, on the 17th of February, 1888; that the said telegraph line was so constructed on said right of way between the town of Bothell in the county of King to the said international boundary line at the town of Sumas in the county of Whatcom, in or prior to the year 1891, and between the town of Bothell and the station of Fremont in the city of Seattle, in the year 1896, and said telegraph line has ever since been and now is maintained and operated on said right of way, under and in pursuance of the right and privilege conferred by the aforesaid contract and with the knowledge, consent and acquiescence of the defendant Northern Pacific Railway Company and its predecessors in interest; that said contract will expire on the 17th of February, 1913.

VI.

That this petitioner, desiring and preferring to secure by contract the perpetual right and privilege of constructing, maintaining and operating its said telegraph line along, upon, over and across said right of way of said defendant Northern Pacific Railway Company, has heretofore made earnest and *bona fide* efforts to agree with said railway company for the said right [3] and privilege, and to agree upon the compensation to be paid by it to said railway company therefor; that said railway company has refused to give its consent to petitioner for said right and privilege and has failed and refused to agree upon the compensation to be paid by it therefor; that under and by virtue of authority of an act of the Congress of the United States of America, sections 5263 to 5268, inclusive, of the Revised Statutes of the United States, and subsequent amendments thereof by said Congress, the provisions of which have been accepted by this petitioner, as well as by the authority of the statutes of the State of Washington providing for condemnation of private property and for the condemnation by a telegraph company of a portion of the right of way of a railroad company for the purpose of constructing, maintaining and operating its telegraph line along and upon said right of way, this petitioner proposes and is proceeding to condemn and acquire an easement or privilege along, upon and over the said right of way of said Northern Pacific Railway Company, for the construction or reconstruction and for the maintenance and operation of its said telegraph line, from the inter-

section of Evanston Street, near Fremont Station, in the city of Seattle, through the said counties of King, Snohomish, Skagit and Whatcom, to the international boundary line at the north end of the depot building of said railway company in the said town of Sumas; its poles to be erected as near the outer edge of said right of way as circumstances will permit, and in such position as not to interfere with the operation or safety of trains or with the use of the right of way by said railway company or its lessees, for its or their own purposes; and this petitioner proposes to herein condemn so much of the said right of way, between the points and through the counties aforesaid, as may be necessary for its uses [4] for the purpose of constructing or reconstructing, maintaining and operating its telegraph line along, upon, over and across said right of way; that said line is now and will at all times hereafter be constructed and reconstructed of the best material and by the most approved methods of construction, and will consist of a single line of poles not less than twenty (20) nor more than thirty (30) feet in length, including length underground, except at highways or where obstructions exist, where the poles will be of such a height as may be required by statute, or necessary because of physical conditions existing, or to protect other wires or structures rightfully upon the said right of way; that the poles will be about ten (10) inches in diameter at the base, planted from four (4) to eight (8) feet in the ground, according to the length of the poles, and in such positions upon said right of way as safe and proper

construction permit; the poles to be placed upon that portion of said right of way between a line five feet from the outer edge thereof and a line twenty-five feet from the center of the main track, except where the right of way may be less than sixty feet in width, or where the location of the main track upon the right of way, or the location of buildings, tracks or other improvements or obstructions upon the right of way may make it impossible to place the poles upon that portion of the right of way above described, in which event the poles will be placed upon the most practicable remaining portion of the right of way consistent with the safe and proper construction of said telegraph line, such portion of said right of way to be designated by said railway company or its lessees, so as not to interfere with the ordinary travel or use of said railroad; that the poles will be set about one hundred and sixty-five (165) feet [5] apart, making a total of thirty-two (32) to thirty-five (35) poles to the mile, excepting at sharp angles, where they may be not less than seventy-five (75) feet apart, and around curves, where they may be from one hundred and seventeen (117) to one hundred and thirty-one (131) feet apart; the poles to be equipped with cross-arms about ten feet long, at or near the top of the poles, fastened at about the middle of the cross-arms to the poles, and along and upon said cross-arms or poles, or upon said cross-arms and poles, will be strung a sufficient number of wires to transact such business as will be given to the telegraph company by the United States Government and the public. That

said line of poles and wires will be so constructed, maintained and operated as not to interfere with the ordinary travel or use of said railroad.

VIII.

This petitioner further avers that the only lands that will be actually taken or occupied by it by virtue of this proceeding will be about one square foot for each pole; that the space between the poles and under the wires can be used by said railway company or its lessees for all purposes for which it has heretofore been used; that wherever it becomes necessary for said telegraph line to cross said right of way the said crossing will be made by having its poles at such crossing so erected and its wires so insulated and strung so high above said railroad track as to prevent any injury to or interference with the employees or property of the said railway company; and this petitioner further stipulates that its said telegraph line will not interfere with any other telegraph or telephone line now rightfully upon said right of way. That if at any time the said railway company, its successors or [6] lessees, shall require for railroad purposes the immediate use of any of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, this petitioner will, at its own expense, remove its line to some other place, to be designated by said railway company, adjacent thereto, on such right of way, so as not to interfere with the use of said right of way for railroad purposes. That said telegraph line will not be erected on any embankment or slope or any cut of said right of way, without the

consent of said railway company; and if at any time said railway company or its lessees shall require its entire right of way for railroad purposes at any point, the telegraph company will at such point or points remove its line entirely off said right of way.

VIII.

That the defendant denies the right of this petitioner to maintain and operate its said telegraph line along, over and upon the right of way of said railway company, after the expiration of the contract hereinbefore mentioned, to wit, February 17, 1913, and petitioner avers that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00).

WHEREFORE, your petitioner prays that a jury may be impaneled to ascertain and determine the compensation to be paid in money, irrespective of any benefit from the said telegraph line, to the above-named defendant, and to all persons interested, whether as tenants, incumbrancers, or otherwise, for the taking or injuriously affecting of said lands, or in [7] case a jury be waived, that the compensation be ascertained by this Court, or a Judge thereof, and that a judgment or decree of appropriation of said easement may be made and entered herein.

POSTAL TELEGRAPH-CABLE COMPANY OF WASHINGTON.

By J. A. FOREHAND,

Its President.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Petitioner.

State of Washington,
County of King,—ss.

J. A. Forehand, being first duly sworn, on oath deposes and says: That he is the President of the Postal Telegraph-Cable Company of Washington, petitioner in the above-entitled proceeding; that he makes this affidavit in verification of the foregoing petition on behalf of said petitioner; that he has seen and read the said petition, knows the contents thereof, and believes the same to be true.

J. A. FOREHAND.

Subscribed and sworn to before me, this 24th day of May, A. D. 1912.

[Seal]

H. J. RAMSEY,

Notary Public in and for the State of Washington,
Residing at Seattle. [8]

Indorsed: Petition. Filed in the U. S. District Court, Western District of Washington. May 27, 1912. A. W. Engle, Clerk. By S., Deputy. [9]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Notice and Summons.

The President of the United States of America,
Greeting: To the Northern Pacific Railway
Company, a Corporation, Defendant:

You are hereby notified that the Postal Telegraph-Cable Company, a corporation, petitioner herein, has filed its petition in the above-entitled court to condemn and acquire an easement and privilege along, upon and over the right of way of the said Northern Pacific Railway Company, for the construction or reconstruction and for the maintenance and operation of a telegraph line from the intersection of Evanston street near Fremont station, in the city of Seattle, State of Washington, through the counties of King, Snohomish, Skagit and Whatcom in said State, to the international boundary line at the north end of the depot building of said railway company in the town of Sumas, in said county of Whatcom; its poles to be erected as near the outer edge of said right of way as circumstances will permit and in such position as not to interfere with the operation or safety of trains or with the use of the right of way by the said railway [10] company or its lessees for its or their own purposes; and this petitioner proposes in said proceedings to condemn so much of the said right of way between the points and through the counties aforesaid as may be necessary for its uses for the purpose of constructing or reconstructing, maintaining and operating its telegraph line along, upon, over and across said right of way; a copy of which petition is hereunto at-

tached, and hereby referred to for a more full and complete statement of the objects thereof and the description of said right of way.

You are further notified that said petition will, on the 10th day of June, A. D. 1912, at the hour of ten o'clock A. M. on said day, or as soon thereafter as counsel can be heard, be presented to the Judge of said Court in the Federal courtroom in the city of Seattle, Washington; and at such time and place as may be then prescribed by said court, the said petitioner will submit proof, as prescribed by law, of the matters and things alleged in the said petition.

Witness, the Hon. C. H. HANFORD, Judge of said court, this 27th day of May, in the year of our Lord one thousand nine hundred and twelve and of our independence the one hundred and thirty-sixth.

[Seal]

A. W. ENGLE,

Clerk.

By F. A. Simpkins,

Deputy Clerk.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Petitioner. [11]

Return on Service of Writ.

United States of America.

Western District of Washington,—ss.

I hereby certify and return that I served the annexed Notice and Petition on the therein named Northern Pacific Railway Company by handing to and leaving a true and correct copy thereof with J.

O. McMullen, City Passenger Agent of the said Northern Pacific Railway Company personally at Seattle, in said District, on the 27th day of May, A. D. 1912.

JOSEPH R. H. JACOBY,
U. S. Marshal.
By Fred M. Lathe,
Deputy.

May 28, 1912.

Fees: \$2.12.

Indorsed: Notice and Summons. Filed in the U. S. District Court, Western Dist. of Washington, May 28, 1912. A. W. Engle, Clerk. By S., Deputy.
[12]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY, OF
WASHINGTON, a Corporation,
Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Notice of Appearance [of Defendant, etc.].

To the Above-named Petitioner, and to Its Attorneys, Messrs. Hughes, McMicken, Dovell & Ramsey:

You and each of you will take notice that the de-

fendant, Northern Pacific Railway Company, a corporation, hereby enters its appearance herein through its attorney, Mr. C. H. Winders;

And you are notified that all pleadings and papers in said cause from this date are to be served upon said attorney at his address below stated.

Dated at Seattle, Washington, this 10th day of June, 1912.

C. H. WINDERS,
Attorney for Defendant.

712 Lowman Building,
Seattle, Washington.

Indorsed: Notice of Appearance. Filed in the U. S. District Court, Western Dist. of Washington, June 10, 1912. A. W. Engle, Clerk. By S., Deputy. [13]

**[Order Directing Impanelment of Jury to Ascertain
and Determine Compensation, etc.]**

*In the District Court of the United States, for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY, OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

ORDER ADJUDICATING NECESSITY.

The petition of the Postal Telegraph-Cable Company of Washington, a corporation of the State of Washington, for the appropriation of certain lands in said State for the purpose of the construction, maintenance and operation of a telegraph line, having come on to be heard before the Court, and it appearing by satisfactory proof that all parties interested in the land to be appropriated for said purposes, as described in said petition, to wit:

An easement or privilege along, upon and over the right of way of said Northern Pacific Railway Company, for the construction or reconstruction and for the maintenance and operation of its said telegraph line from the intersection of Evanston street, near Fremont station, in the City of Seattle, through the counties of King, Snohomish, Skagit and Whatcom, to the international boundary line at the north end of the depot building of said railway company in the town of Sumas, in Whatcom County, Washington; its poles to be erected as near the outer edge of said right of way as circumstances will permit and in such position as not to interfere with the operation or safety of trains or with the use of the right of way by said railway company, or its lessees, for its or their own purposes; said telegraph line to be constructed and reconstructed of the best material and by the most approved methods of construction and to consist of a single line of poles not less than twenty, nor more than thirty feet in length, including length underground, except at highways

or where obstructions exist, where the poles will be of such height as may be required by statute or necessary because of physical conditions [14] existing or to protect other wires or structures rightfully upon said right of way; said poles to be about ten inches in diameter at the base, planted from four to eight feet in the ground, according to the length of the poles, and in such position upon said right of way as safe and proper construction will permit; the said poles to be placed upon that portion of said right of way between a line five feet from the outer edge thereof and a line twenty-five feet from the center of the main track except where the right of way may be less than sixty feet in width, or where the location of the main track upon the right of way, or the location of buildings, tracks or other improvements or obstructions upon the right of way may make it impossible to place the poles upon that portion of the right of way above described, in which event the poles will be placed upon the most practicable remaining portion of the right of way consistent with the safe and proper construction of said telegraph line; such portion of said right of way to be designated by said railway company or its lessees, so as not to interfere with the ordinary travel or use of said railroad; the said poles to be set about one hundred and sixty-five feet apart, making a total of thirty-two to thirty-five poles to the mile, excepting at sharp angles, where they may be not less than seventy-five feet apart, and around curves, where they

may be from one hundred and seventeen to one hundred and thirty-one feet apart; said poles to be equipped with cross-arms about ten feet long at or near the top of the poles, fastened at about the middle of the cross-arms to the poles, and along and upon said cross-arms or poles, or upon said cross-arms and poles, to be strung a sufficient number of wires to transact such business as will be given to the telegraph company by the United States Government and the public; said line of poles and wires to be so constructed, maintained and operated as not to interfere with the ordinary travel or use of said railway;

have been duly served with notice or have appeared as prescribed by law, and said petitioner having appeared by its attorneys, Hughes, McMicken, Dovell & Ramsey, and the defendant Northern Pacific Railway Company, having appeared by its attorney, C. H. Winders, and the Court having heard the evidence submitted thereon, and being duly advised in the premises, finds that the contemplated use for which said land is sought to be appropriated is really a public use and that the public interest requires the prosecution of such enterprise and that the land sought to be appropriated herein is required and necessary for the purposes of the construction, maintenance and operation of said telegraph line; [15]

NOW, THEREFORE, it is hereby ordered that a jury be impaneled to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by said

petitioner, to the owners of the land described in said petition and to all tenants, incumbrancers and others interested therein, for the taking or injuriously affecting such land, or, in case a jury be waived as in other civil cases in courts of record, in the manner prescribed by law, then that the compensation to be made, as aforesaid, be ascertained and determined by the Court or Judge thereof.

Done in open court, this 17th day of June, A. D. 1912.

C. H. HANFORD,
Judge.

O. K. as to form.

C. H. W.

Indorsed: Order Adjudicating Necessity. Filed in the U. S. District Court, Western Dist. of Washington. June 17, 1912. A. W. Engle, Clerk. By S., Deputy. [16]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY
OF WASHINGTON, a Corporation,
Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Verdict.

We, the jury duly impaneled in the above-entitled cause, do find that the compensation to be paid in money, irrespective of any benefit from the proposed telegraph line of the petitioner, to the above-named defendant, Northern Pacific Railway Company, and all persons interested, whether as tenants, encumbrancers, or otherwise, for the taking or injuriously effecting of the lands described in the petition and order adjudicating necessity, is the sum of \$15,000.00.

B. R. BRITTON,

Foreman.

Indorsed: Verdict. Filed in the U. S. District Court, Western Dist. of Washington. Nov. 22, 1912. Frank L. Crosby, Clerk. F. A. Simpkins, Deputy.
[17]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY, a
Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

**Memorandum of Costs and Disbursements to be
Taxed in Favor of the Defendant and Against
the Petitioner.**

Clerk's fees.....	
Attorney's fees.....	\$20.00
Reporter's fees.....	20.00
Witness' fees:	
C. E. Perkins, Tacoma, 3 days, 72 miles.....	\$ 8.10
Joseph Smith, Tacoma, 4 days, 72 miles....	9.60
S. M. Smith, Seattle, 3 days, 2 miles.....	4.60
J. E. Craver, Seattle, 4 days, 2 miles.....	6.10
Ralph Morris, Seattle, 4 days, 2 miles.....	6.10
E. E. Dildine, St. Paul, 4 days, 180 miles..	15.00
W. H. Gale, Sedro Woolley, 4 days, 172 miles.....	14.60
F. Nibert, Snohomish, 1 day, 76 miles.....	5.30
H. F. Walton, Snohomish, 3 days, 76 miles..	8.30
Axel Gunderson, Bothell, 3 days, 44 miles..	6.70
John Walsh, Snohomish, 4 days, 76 miles...	9.80
Herman Riddell, Hartford, 4 days, 92 miles..	10.60
A. J. Rhodes, Arlington, 4 days, 120 miles...	12.00
W. E. Vender, Deming, 3 days, 240 miles..	16.50
Total.....	

United States of America,
Western District of Washington,—ss.

C. H. Winders, being first duly sworn, on oath deposes and says: That he is attorney for the defendant Northern Pacific Railway Company in the above-entitled cause, and as such has knowledge of the facts as hereinabove set forth; that the items in the above

memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause, and that the services charged therein have been actually and necessarily performed as therein stated.

C. H. WINDERS.

Subscribed and sworn to before me this 23 day of November, 1912.

[Seal]

F. C. REAGAN,

Notary Public in and for the State of Washington,
Residing at Seattle. [18]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY, a
Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

To the Above-named Petitioner and to Messrs.
Hughes, McMicken, Dovell & Ramsey:

You and each of you will take notice that the defendant will make application to the clerk of the above-entitled Court on Monday morning, the 25th day of November, 1912, at the hour of ten o'clock

A. M., to tax the costs in this proceeding in favor of the defendant, copy of its memorandum of costs being served upon you herewith.

C. H. WINDERS,

Attorney for Defendant Northern Pacific Railway Company.

Due service of the within Cost Bill and Notice acknowledged and a true copy received this 23d day of Nov., 1912.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Petitioner.

Indorsed: Notice and Memorandum of Costs. Filed in the U. S. District Court, Western Dist. of Washington. Nov. 25, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. [19]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Motion for a New Trial.

Comes now the petitioner and moves the Court to vacate the verdict of the jury returned in this cause

and to grant a new trial thereof, for the following causes:

I.

Irregularity in the proceedings of the Court and of the defendant materially affecting the substantial rights of the petitioner.

II.

Misconduct of counsel for the defendant.

III.

Excessive damages appearing to have been given under the influence of passion and prejudice.

IV.

Insufficiency of the evidence to justify the verdict of the jury.

V.

That the verdict of the jury is against the law.
[20]

VI.

Error in law occurring at the trial and excepted to at the time by the petitioner.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Petitioner.

Copy of within Motion received, and due service of same acknowledged this 16th day of Dec., 1912.

C. H. WINDERS,

Atty. for Deft.

Indorsed: Motion for New Trial. Filed in the U. S. District Court, Western Dist. of Washington. Dec. 17, 1912. Frank L. Crosby, Clerk. By E. M. L., Deputy. [21]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Order Overruling Plaintiff's Motion for New Trial.

BE IT REMEMBERED that this cause came on heretofore duly and regularly for hearing upon the motion for new trial of the petitioner, Postal Telegraph-Cable Company of Washington, a corporation, the said petitioner appearing by its attorneys, Messrs. Hughes, McMicken, Dovell & Ramsey, and the defendant by its attorney, Mr. C. H. Winders; and the matters set forth in said motion for new trial being duly and regularly submitted to the Court, and counsel for both parties having presented their argument, said motion was taken under advisement, and the Court having heretofore considered the same and entered its memorandum opinion denying said motion; now, then, upon motion of the defendant it is by the Court ORDERED, ADJUDGED AND DECREED that the motion for new trial heretofore filed by the petitioner Postal Telegraph-Cable Company of Washington, a corporation, be and the same is in all things overruled and denied, to all of which

petitioner excepts and an exception is expressly allowed.

Dated at Seattle, Washington, this 19th day of February, 1913.

CLINTON W. HOWARD,

Judge.

O. K. Form.

HUGHES, McM. D. & R. [22]

Indorsed: Order Overruling Motion for New Trial. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 19, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [23]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,
Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Judgment.

BE IT REMEMBERED that this cause came on regularly for hearing and trial in the above-entitled court on the 19th day of November, 1912, before the Honorable Clinton W. Howard, Judge of said court, and a jury impaneled to ascertain and determine the

compensation to be made in money, irrespective of any benefit from any improvement proposed by said petitioner, to the said defendant, Northern Pacific Railway Company, as owner of the land described in said petition, for the taking or injuriously affecting such land, in the manner prescribed by law, and pursuant to the order adjudicating the necessity made and entered by said Court on the 17th day of June, 1912; and said petitioner having appeared by Hughes, McMicken, Dovell & Ramsey, its attorneys, and the defendant having appeared by C. H. Winders, its attorney, the following proceedings were thereupon had, to wit:

A jury was thereupon duly and regularly impaneled and sworn to try the above-entitled cause, and the evidence [24] was submitted by witnesses duly and regularly sworn by and on behalf of the petitioner and defendant herein; and after all the evidence was taken and after arguments were made by the respective counsel herein for and on behalf of the petitioner and the defendant, the jury were duly and regularly instructed by the Court, and said jury retired to consider and deliberate upon their verdict; thereafter, on the 22d day of November, 1912, the said jury returned into court its verdict ascertaining, finding and awarding damages in favor of the said defendant for the taking and injuriously affecting of the land described in the petition of the petitioner on file herein in the sum of fifteen thousand dollars (\$15,000.00); and thereafter a motion for a new trial having been duly and regularly filed herein in the manner and within the time provided by the

rules of this court, and the Court having thereafter on the 19th day of February, 1913, overruled said motion;

NOW, THEREFORE, it is hereby ORDERED AND ADJUDGED by the Court that the amount of compensation to be paid by the petitioner to the defendant herein for the taking and injuriously affecting of the lands described in the petition herein by the construction, reconstruction, maintenance and operation of the petitioner's telegraph line in the manner and upon and under the conditions and stipulations in said petition set forth and described, be and is hereby fixed and determined at the sum of fifteen thousand dollars (\$15,000.00); and that upon the payment of said sum to the defendant, with interest thereon at the rate of six per cent per annum from the date of said verdict, into the court for the benefit of the defendant, together with the costs of said suit taxed at [25] the sum of \$———, said petitioner shall be entitled to a final decree of appropriation appropriating to its use for the purposes specified in its said petition and upon the conditions and stipulations therein set forth the easement or right of way for its said telegraph line as described in its said petition and in the aforesaid order of this Court of June 17, 1912.

Done in open court this 3d day of March, A. D. 1913.

By the Court:

CLINTON W. HOWARD,
Judge.

O. K.—C. H. W.

Indorsed: Judgment. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [26]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that heretofore, to wit, on November 19, 1912, the above-entitled cause came regularly on for trial in the above court before the Honorable Clinton W. Howard, Judge of said Court, sitting with a jury; the petitioner appearing by E. C. Hughes of Hughes, McMicken, Dovell & Ramsey, and the defendant appearing by C. H. Winders;

And thereupon the following proceedings were had and done, to wit:

The jury having been first duly impaneled and sworn, the petitioner, to maintain the issues on its part, introduced and offered in evidence the following testimony, to wit:

Counsel for the defense admits the averments of

paragraphs I and II of the petition, and all of paragraph III except as to the width of the right of way. [27*—1+]

[Testimony of J. G. Blake, for the Petitioner.]

J. G. BLAKE, being first duly sworn, testified on behalf of petitioner as follows:

Direct Examination.

Q. (By Mr. HUGHES.) State your name.

A. J. G. Blake.

Q. What is your business, Mr. Blake?

A. I am general superintendent of the Pacific Division of the Postal Telegraph-Cable Company, with headquarters at San Francisco, California. I have held that position since June, 1908, and prior thereto was assistant general superintendent for a little over a year. Prior to that time I was in Seattle eighteen years in the employ of the same company, for the first thirteen years as manager of the Seattle office and for the remaining five years as district superintendent. I had charge of the line repairs from Seattle to Sumas.

Q. You have been acquainted with the telegraph line on the right of way of the defendant road between Seattle and Sumas for how long?

A. Ever since the line was built. Portions of it were built in 1889-90-91, and the section between Fremont and Bothel was built in 1896. I am familiar with the right of way of the railroad company between Seattle and Sumas on which this tele-

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

(Testimony of J. G. Blake.)

graph line is located.

Q. Describe as nearly as you can that right of way and its width in different parts.

A. Beginning at Fremont there is none of it less, I believe, than fifty feet in the total width with the exception of, [28—2] I believe, we have a strip through the University grounds where they have no right of way at all. And there is a short section north of Lake Station, where they have but twenty-five feet on the west side, unless they have bought it recently—I think that is where our poles are in the Lake—on the east side of the lake. From there, I think, within a short distance this side of Bothel the right of way again is one hundred feet and is one hundred feet or more, with very few exceptions, all the way from there to Sumas—there are a few short sections where it is only fifty feet. The Western Union Telegraph Company has a line on the same right of way from Fremont to Sedro Woolley. From Sedro Woolley to Sumas there is only the one line.

Q. Describe the manner in which the telegraph line is constructed and is to be reconstructed and maintained.

A. The poles vary from twenty-five to thirty feet in length and in some cases where there are obstructions they are longer, and they are set about an average of thirty-five to the mile—from one hundred and fifty to one hundred and sixty-five feet apart. They are braced or guyed on all curves, to hold the strain. They are set from four to eight feet in the ground,

(Testimony of J. G. Blake.)

depending upon the length of the pole. The diameter of the pole, say four or five feet from the ground, would average about ten inches. On sharp angles the poles are closer together, say seventy-five feet, and from that up to one hundred and fifteen and one hundred and thirty feet on curves.

Q. Where there is any strain by reason of the angle in the road or a sharp curve, in what manner do you sustain [29—3] the poles?

A. On the present construction we put in a guy which is attached to what we call an anchor rod, which is anchored in the ground by a dead man. The guy wire reaches from the top of the pole to the anchor rod, which is set anywhere from five to ten feet from the base of the pole—five feet is generally sufficient.

Q. Now, explain the manner in which the cross-arms and insulators and wires are constructed and maintained upon the line.

A. The cross-arms are fastened to the poles with a center bolt from a half an inch to five-eighths of an inch in diameter and there are two braces made in a "V" shape reaching from the cross-arm to nearly two feet below it. The cross-arms are placed two feet apart, from center to center, and the braces are just long enough to reach between them. These are fastened to the cross-arms by a three-eighths or a quarter inch bolt, and the heel of the brace is fastened to the pole with a four inch lag screw. The cross-arms carry pins to which are attached the insulators and the wires tied to the insulators with

(Testimony of J. G. Blake.)

what we call a tie wire.

Q. Are these poles, and cross-arms and wires constructed so as to be secure against falling or injury or damage? A. Yes.

Q. Where you have occasion to cross the track with wires from one side to the other for any reason, because of physical conditions or because of the desire of the railroad company, in what manner can that be done? [30—4]

A. To have the poles of sufficient length to clear the rail with the Northern Pacific Railroad requirement, which is twenty-two feet—we usually make it higher than that, from twenty-five to thirty—we have poles that are always extra well guyed at such crossings.

Q. In the course of your duties were you frequently required to pass over and along this road and this right of way and inspect the right of way and your telegraph line and wires?

A. I was over the right of way very frequently up to five years ago. I have been over it about once a year since then, I think.

Q. Have you ever known of any instance where the existence of your telegraph line has caused any interruption to the operation of the railroad?

A. No, sir.

Q. Or any interference with the uses and operation of the railroad, or of the use of the right of way for railroad purposes? A. No, sir.

Q. Has there ever been any instance within your knowledge as a telegraph operator, where the pres-

(Testimony of J. G. Blake.)

ence of the telegraph line constructed and maintained as it is here proposed to construct and maintain this telegraph line, has interfered with the railroad company's use of its right of way for railway purposes? A. No, sir.

Q. What damage or diminution in the value of the use of this right of way by this railway company or its successors in interest, in the use and operation of the right of way for any railway purpose, would be occasioned or is occasioned by the appropriation of the right to construct [31—5] and maintain a telegraph line as proposed in this petition—you heard the petition read by me and you know its contents, do you? A. Yes.

Q. Now, please answer the question.

(Objection being made on the ground, among other things, that the witness had not shown that he was qualified to answer the question, the objection was sustained upon the above specified ground.)

Q. What experience have you had in the telegraph business and in supervising and looking after construction, maintenance and operation of telegraph lines?

A. I was connected with telegraph companies in that relation for twenty-six years.

Q. During that time has it been a part of your business to be familiar with the uses of the railway right of way for railroad purposes as well as the uses of the same railway right of way for telegraph lines?

A. I am familiar with it.

Q. Have you, during that time, been familiar with

(Testimony of J. G. Blake.)

the negotiations for acquiring the right of way for telegraph lines by your company over the rights of way of railway companies? A. Yes, sir.

Q. Have you conducted such negotiations for fixing and determining upon the price, if any, to be paid? A. I have.

Q. Have you repeatedly qualified as a witness in cases to testify respecting the effect of the construction, and maintenance of a telegraph line on the uses of the right of way by the railroad company, and the diminution, [32—6] if any, in the value of the right of way of the railway company for railway purposes? A. I have in one case.

Mr. HUGHES.—I now ask that the question be read to the witness.

(Whereupon the stenographer reads the question to the witness as follows:)

Q. What damage or diminution in value of the use of this right of way by this railway company or its successors in interest, in the use and operation of the right of way for any railway purpose, would be occasioned or is occasioned by the appropriation of the right to construct and maintain a telegraph line as proposed in this petition?

By Mr. WINDERS.—Objection renewed.

The COURT.—Has he had any experience in the construction and operation of railroads?

The WITNESS.—No, I have had no experience in railroading.

The COURT.—Is the question specifically confined to this right of way and the damage to be

(Testimony of J. G. Blake.)

done to this specific right of way?

Mr. HUGHES.—Yes.

The COURT.—I will overrule the objection.

A. It would be merely nominal—no actual damage.

Cross-examination.

Q. (By Mr. WINDERS.) Mr. Blake, about how much space does one of those poles and the guy wires take up—how far out from the base of the pole is your guy wire? [33—7]

A. Five to ten feet.

Q. You set your pole up and then you have the guy wire extending down? A. Yes, sir.

Q. It would extend about ten feet from the bottom of the pole?

A. On the curves and places like that where it is necessary to guy.

Q. Take it between Snohomish and Fremont Station, what proportion of your poles are guyed?

A. I could not tell you.

Q. Give the jury your best judgment.

A. I never counted them. I should judge over forty per cent. It is rather a crooked road through there.

Q. And those poles at this time are in distance from the main track from ten to fifteen or twenty feet? A. Yes, sir, from ten to twenty-five feet.

Q. Is there a single industrial track between the city of Fremont and the town of Sumas, a distance of one hundred and twenty-six miles, where your poles are not now set between the main running

(Testimony of J. G. Blake.)

track and these side tracks and switches?

A. Yes, there are some.

Q. Can you name one?

A. I think at Sedro Woolley.

Q. Your poles within the town of Sumas, starting at the International boundary line, are on the very edge of the right of way?

A. They are just back of the depot there—they are about thirty-five or forty feet from the main line, I should judge. [34—8]

Q. Is it not true that in the town of Sumas your poles are set within six feet of the team track that handles all the business in that town?

A. I could not say that, but there is no doubt that they are because it is permitted by the railroad company.

Q. Did you ever notice where the people who do business with the Northern Pacific Railway Company within the town of Snohomish, take delivery?

A. I have not.

Q. Well, there is a track behind the depot?

A. On the west side of the depot?

Q. Yes, back of the depot—your pole line extends along that track? A. Yes, sir.

Q. It is your opinion that those poles which are within five or six feet of the delivery tracks where deliveries are made and where the train crews are working in making their deliveries and spotting is absolutely a nominal damage only to the company?

A. Yes.

Q. Mr. Blake, in going over the right of way on

(Testimony of J. G. Blake.)

your annual trip, how did you go?

A. On the train.

Q. Have you ever had any experience in maintaining a right of way either for a pole line or a railroad right of way? A. No, sir.

Q. Have you ever had any experience that would enable you to advise the jury of the expense of maintaining a railroad right of way with the poles on and with the poles off? [35—9]

A. No, sir, except my observation as a telegraph man.

Q. State to the jury the character of the country through which this line runs, as to whether or not it is timbered or otherwise.

A. It is mostly timbered. I believe the right of way has been cleared of timber throughout.

Q. Now, in maintaining and constructing and reconstructing this telegraph line, how much of this right of way would you traverse?

A. The full distance, north and south.

Q. I am talking about the width?

A. A man would have to walk from pole to pole wherever it is most convenient for them to walk.

Q. When were you over this line last?

A. About a month ago.

Q. Are you familiar with the work that is now in progress on this line?

A. No, sir; I noticed men were working there.

Q. Do you believe that, in making fills and in tamping our grades and dumping earth around these poles without knocking them over, the company men

(Testimony of J. G. Blake.)

can go along there and make those improvements just as easy without devoting any more time than if your poles were not there?

A. Well, the poles are removed when they want to do work of that kind.

Q. How many men do you keep along this line and where are they located?

A. One man in Seattle, one at Snohomish, one at Sedro Woolley and one at Sumas, for what we call "trouble" men. They go out and make repairs when the wires are down—that is [36—10] their principal duty. We have five wires from here to Snohomish, and four from Snohomish to Sumas.

Q. At Crescent mile post 123 how about the right of way there—as to the character of the growth and vegetation, and the like?

A. There is some timber in there and there is some cleared land between Nooksack and Sumas; it is comparatively level. The country has been timbered through there. A good deal of brush grows up there annually. At Nooksack mile post 119 our poles are located on the west side of the right of way, I could not say how far from the main track. At Deeming mile post 110 we run right through the depot platform. We had to cross over there in order to get the lines into the station for the railroad company.

At the Nooksack River we are on the west side of the right of way as we come south, then we cross to the east side of the right of way and we follow

(Testimony of J. G. Blake.)

on the east side until we get just south of the Acme depot.

Q. What is the fact as to whether or not your poles extend to these loading and unloading platforms? A. I could not say.

Q. Would you say that if they did, in the maintenance of the right of way on that cut and fill, and the maintenance of the log dump along there, that that would cause any inconvenience or other additional cost to the railroad company in the operation of its system or the maintenance of its right of way?

A. I would not think it would; but if it did, there could be a long span made there to clear it if they asked us to do it. [37—11]

Q. Are you willing to stipulate now to do that?

Mr. HUGHES.—We have already stipulated, if the Court pleases.

The COURT.—The stipulations contained in the petition are made a part of the decree.

WITNESS. (Answering questions asked by Mr. Winders.) I could not say as to the growth of brush in a year. I know it grows quite rapidly. I think a couple of years' growth would reach the telegraph wires. I have not had such experience as would enable me to say whether or not it costs any more to clear the right of way of this brush with the telegraph poles there than with them off.

Q. Do you know from your experience or observation as to whether or not a railroad company, or any company maintaining a right of way, is required

(Testimony of J. G. Blake.)

to expend more time or labor, or more additional expense in burning and clearing the right of way with poles on or with them off?

Mr. Hughes objected to this as not proper cross-examination.

(Objection overruled.)

A. I could not say.

Q. In making the answer to the question which you made, that there was no added expense to this company, you did not take into consideration those matters which I have referred to?

A. Not in detail.

Q. Mr. Blake, you spoke about the contract under which you are now operating. I wish you would examine that agreement and state whether or not that is the contract under which you are now operating. (Handing document to witness.)

Mr. HUGHES.—Objected to as not cross-examination.

(Objection overruled.)

The WITNESS.—Yes.

(Mr. Winders thereupon had the instrument marked "Defendant's [38—12] Exhibit 'C' for identification.")

Q. Have you any sufficient knowledge of the situation between here and Sumas to advise the jury as to whether or not, and if so, how frequently, in windstorms and the like, by the falling of trees along the right of way, your wires or poles are knocked down?

A. I could not say how often that happens.

(Testimony of J. G. Blake.)

Q. Are you sufficiently advised to give the jury an opinion as to how close to a telegraph pole a railroad company can construct a track with your ten foot cross-arm?

A. That depends on the height of the pole.

Q. Take your ordinary line as it exists to-day, and what you are stipulating in this petition.

A. Well, they could build it within six feet.

Q. You know that it is a dangerous proposition for the men who have to be up on the cars to get under wires or under the cross-arms?

A. It is not dangerous if the cross-arms are high enough to clear. I do not know of any main line having its track constructed within five or six feet of the telegraph poles. I know there are such sidings, but I could not name them. I know it is the standard rule with the Northern Pacific to clear sidetracks six feet with the poles. That means a clearance of six feet from the poles on either side.

Q. In stating your opinion to this jury of no damage, were you basing that upon conditions as they exist at this time in your pole line along the right of way? A. Yes.

Q. Conditions that are existing under this contract under [39—13] which you are operating?

Mr. HUGHES.—I object to that as irrelevant and immaterial—the conditions are those set forth in the petition.

The COURT.—I will sustain the objection.

Mr. WINDERS.—At this time, in view of the witness' answer, I offer in evidence this contract which

(Testimony of J. G. Blake.)

is marked "Defendant's Exhibit 'C' for identification," as part of the cross-examination.

Mr. HUGHES.—I object to it as irrelevant and immaterial to the controversy now being tried before this jury.

(The Court reserved its ruling until a later time, when the objection was sustained.)

Redirect Examination.

Q. (By Mr. HUGHES.) Mr. Blake, you have been asked certain questions as to existing conditions at certain places, and I understand you to say that where your poles were put in there it was for the purpose of connecting with the stations?

A. It was particular places we had to go to the station.

Q. At present and in the past you have connected with the stations? A. Yes.

Q. In the future, and after this condemnation, if they should use the Western Union or any other wire, it would not be necessary for you to maintain those poles at those places, and, in that event, I will ask you whether or not if they request it, your poles would be removed to such places as they might indicate upon their right of way, or if their right of way was entirely required, whether they would be removed off the right of way. [40—14]

Mr. WINDERS.—You are assuming several things that are not true. I will object to the question. There is no evidence in the case that we are using their wires up to Sedro Woolley.

The COURT.—There is no testimony to that ef-

(Testimony of J. G. Blake.)

fect. I will sustain the objection to the form of the question.

Q. (By Mr. HUGHES.) Mr. Blake, the jury will remember what your testimony was in regard to any places where your poles are now close to the station. I will ask you if after the expiration of this contract and after the taking effect of this condemnation proceeding, if required by the railroad company those poles would be removed to some other point indicated on their ground, or if they required all of the right of way for their uses, they would be removed entirely off their right of way.

A. Yes, sir. [41—15]

**[Testimony of Horace Middaugh, for the
Petitioner.]**

HORACE MIDDAUGH, having been first duly sworn, testified on behalf of the petitioner as follows:

My name is Horace Middaugh. I am sixty-six years old. I have been engaged in the railroad business about twenty-three years. I was on the canal department of the Pennsylvania Railroad from 1875 to 1885. I was engaged with the Seattle, Lake Shore & Eastern Railroad from 1889 to 1899 as superintendent of bridges, building and track. My duties were to look after the construction, repairs and rebuilding. While I was engaged on the Pennsylvania Railroad there were two telegraph lines on the right of way. On the Seattle, Lake Shore & Eastern Railroad there was only one—the Postal Telegraph line for the first three or four years, and after that the Western Union and Postal were both

(Testimony of Horace Middaugh.)

on the right of way as far as Sedro Woolley. This road is now a branch of the Northern Pacific and runs from Seattle through Snohomish and Sedro Woolley to Sumas.

During my experience I have never known of any injury or damage to the railway company in the operation of its trains or railway service in consequence of the presence upon its right of way of telegraph lines. I have known of poles to fall across the track when there was a very high wind, and we have also had trees across the track, too.

Q. Did that impose any added burden or inconvenience or damage to the railroad company?

A. Well, it would take a few minutes to throw the pole off.

Q. Did you ever know of any specific instance where a pole actually fell across the track during a storm, in connection with the falling of the trees?
[42—16]

A. Yes, I do. I recollect of one case when they had a very big wind, where a pole fell across the track up just below Getchell on our sharp curves.

Q. At the same time were there trees or other obstacles thrown across the tracks?

A. Well, we were twenty-four hours clearing the track all along there. After such violent storms the railroad company is required to clear the track as soon as possible and pass the trains.

Q. Would it be necessary even if there were no telegraph lines there? Would it be necessary to inspect the track in the same way to see that it was in a safe condition for the operation of the trains

(Testimony of Horace Middaugh.)

after storms? A. Yes; sure.

Q. Does it impose any added burden because there is a telegraph line along the right of way? I mean in the way of care and inspection of your track and keeping it in proper condition for the operation of trains.

A. It would be an added burden if there were no telegraph men to attend to it.

Q. Is there any added expense or burden to the railway company in consequence of the presence of the telegraph line upon its right of way, because of occasional storms?

A. We always make it a business if the lines were torn down by the trees falling, that we immediately coupled them together, but we do that for our own benefit as much as anybody's else, so that we could get in communication with headquarters.

Q. Mr. Middaugh, in the light of your knowledge and experience in the railroad service as explained by you, what would you say would be the injury or damage in the [43—17] diminution of the value of the use of a railroad right of way for railroad purposes, the operation and use of the trains and general necessary railroad purposes which would be caused by the construction and maintenance of a telegraph line in the manner provided by this petition which was read in your hearing? Would it cause any injury or damage, and, if so, what—that is, to what extent?

Mr. WINDERS.—I object to this question on the ground that he has not shown himself qualified or

(Testimony of Horace Middaugh.)

familiar with the duties imposed upon railroad companies since 1899, or with the maintenance of this track.

The COURT.—The question is a general one as to railroads under such conditions for the removal of poles, etc., as are set forth in the petition.

(Objection overruled.)

A. Well, I consider that there would not be any damage.

Q. Mr. Middaugh, from your knowledge of the right of way on this line from Seattle to Sumas, what would you say as to whether the construction and maintenance of a telegraph line would cause any injury or damage to the use and operation of the right of way of the railroad company for railroad purposes—if so, what?

Mr. WINDERS.—I object to that on the ground that the witness has not shown himself to be qualified.

The COURT.—I will sustain the objection. I think his knowledge of this particular line is confined to too remote a period.

(Exception allowed.)

Cross-examination.

Q. (By Mr. WINDERS.) Now, Mr. Middaugh, when were you last over that line?

A. It is several years. They cleared the line on construction. When I am speaking of timber I mean timber standing on the right of way or outside of the right of way; it is just constructed through the woods. [44—18]

(Testimony of Horace Middaugh.)

Q. While you were there did you have the obligation of keeping that right of way clean and clear of brush and grass and that sort of thing? A. Yes.

Q. I wish you would state what the allowance is per pole on that line for the expense of cleaning around it, pulling back the brush, and then the added expense of watching the poles and wires while you are burning the debris per pole.

A. I do not consider the poles would add any extra expense.

Q. It is your testimony, then, to the jury that these section men, in clearing the right of way, can clear around the poles, and that the expense of pulling the brush back from the poles, taking it from under the wires and having the section men watch those poles and wires while it burns, does not cost the company any more money?

A. For this reason: you have your right of way fenced and you have to take it away in order to protect your fences.

Q. We have to take it away from the fence?

A. And naturally, when you take it away from the fence you take it away from your poles. Now, another thing; a pole does not catch fire as easy as your fence does.

Q. Do you know of a single pole between Fremont Station and the station at Sumas that has not been on fire at one time or another in clearing that right of way?

A. Yes, I do, and I know why it caught fire, too. The chances are it catches fire from your engines.

(Testimony of Horace Middaugh.)

Q. What is the purpose of clearing the right of way? A. To prevent fire.

Q. Do you want this jury to understand that this company maintaining its poles on a strip about five feet of the outer edge of the right of way up to within twenty-five [45—19] feet of the track, the poles, as you know, not being on an average of more than twenty feet from the track—that our men can go along where that brush grows nine or ten feet high, and not be interfered with any by reason of the poles being in the road; no additional time taken in pulling the stuff back from the poles; no additional expense in watching those poles from burning?

A. I say it don't require any additional expense. Now, why I say it don't require any additional expense is that it is so small it would hardly be counted. It costs you from a dollar and a half to six dollars an acre, according to the time you let it go, to clear the right of way of brush, etc. The difference with the railway company is that they don't clear it every year—they let it go too long.

Q. I am assuming here that we are complying with the law, and these people are getting a permanent right, and if we burn down one of their poles we would pay for it.

A. If you take it in time you can clear it for a dollar and a half an acre.

Q. Mr. Middaugh, as a railroad man I will ask you, would the presence of those poles within five or six feet along the team track where deliveries are

(Testimony of Horace Middaugh.)

made and cars are loaded, in any way interfere with the service?

A. Yes, sir; they should not be there.

Q. Have you been connected with the railroad service since 1899?

A. Well, not since 1900. I have not been over this line farther than Sedro Woolley in five or six years. I took charge of this line in March, 1889, and was acting as roadmaster from 1894 until 1899. At the time [46—20] I quit the Northern Pacific was operating the line.

Redirect Examination.

Q. (Mr. HUGHES.) Did you testify that in your experience in the cost of the keeping clear of brush of the right of way that the entire right of way would be a dollar and a half to six dollars per mile?

A. No, sir; per acre.

Q. That covered the whole of the right of way?

A. That covered the whole right of way.

Q. Would the presence of telegraph poles add any appreciable amount to that expense? A. No.

Recross-examination.

Q. (By Mr. WINDERS.) Can you give the jury some estimate in cents per mile per year for protecting those poles—added expense by reason of those poles being there, figuring the time of your men?

A. Well, I would say it would be very small.

Q. Would it be thirty cents?

A. It might come to thirty cents.

[Testimony of J. A. Forehand, for the Petitioner.]

J. A. FOREHAND, having been first duly sworn, testified on behalf of the petitioner as follows:

My name is J. A. Forehand. I am superintendent of the Postal Cable Company, Second District, Pacific Division, embracing Oregon, Washington, Idaho and Montana. I am also superintendent of the plaintiff company in the operation of a line from Seattle to Sumas. I have [47—21] occupied the position of superintendent of this company since February, 1907. Prior to that time I was manager of the Seattle office from 1904 until I assumed the position of superintendent. Prior to that I was chief operator of the Seattle office, from 1895 to 1904. Previous to that I was operating in the Seattle office, from September, 1890. Prior to 1907 the principal supervision I had over this telegraph line on defendant's right of way was during the time I was chief operator, from 1895 to 1904.

I have heard the petition in this case read.

Q. (By Mr. HUGHES.) I wish you would explain briefly to this jury in what manner your poles would be erected and your wires strung and maintained.

A. The line will be constructed in what is termed and what will be a first-class manner. The poles will be set in the ground from the depth of four to four and one-half feet to eight or more feet, depending upon the length of the pole—the taller the pole the farther they must be set in the ground in order to be secure and safe from falling. On a straight line the poles will not need to be braced or guyed,

(Testimony of J. A. Forehand.)

but on sharp curves or sharp angles there will be a guy placed on each pole of sufficient strength to protect the line or protect the pole from being thrown over by wind or the pull of the wires—each pole will be properly guyed. The poles will have a ten-foot cross-arm placed within perhaps six or eight inches of the top of the pole. The cross-arm will be fastened to the poles with what is called a center bolt, a half-inch bolt that goes entirely through the pole and with a nut and washer on the back end of [48—22] the pole which will prevent its pulling out. Each cross-arm will have two braces extending from the arm to the pole, the two of them fastened together on the pole to prevent the slipping of the arm. The arms will have the usual tins and insulators upon which the wires will be fastened, the wires grooved in the insulator, that is, the wire is laid in this groove and the tie wire placed around the wire and around the insulator and around the wire again, to prevent its slipping off the wire; that is for insulation as well as to keep the wire in its proper place on the pole.

The purpose is to construct the line, where possible, within five feet of the outer edge of the right of way. Where it is not practical, owing to certain obstructions, we will be obliged to place it nearer the track, endeavoring at all times to keep at least twenty-five feet away from the center of the track. The reason that this is necessary is the fact that the railroad company may at some particular time wish to extend its tracks, or sidetrack or loading track

(Testimony of J. A. Forehand.)

somewhere that might get within five feet of the outer edge, and they would prefer to remove it farther in to the track, and, therefore, it would be necessary for us to move where the railroad company requested us to move to. Our intention is to keep within, as near the outer edge of the right of way as we can.

We will have our regular station linemen placed at various points along the line, whose duty it is to keep the line repaired. In case there should be a break on the wire or any interruption at all, it is noted in the main office as well as in all offices along the line. The [49—23] chief operator will immediately locate the trouble and order the lineman in the location to make the repairs. The lineman also will cover his particular beat, as we call it, or territory, on regular inspection trips. If there is anything irregular or anything that might possibly cause damage later on, it is corrected at the time. For instance, he may find, as often is the case, that a large tree—an old dead tree, for instance, which stands outside of the right of way which leans towards the line—he will get permission to cut the tree; go up the tree with a line and attach it to it and cut the tree and fall it away from the line. Were it not done, probably, in some big storm it would fall across the lines and break them down.

Q. Are those trees tall enough also to reach the tracks of the railroad company?

A. In many cases they would be. I would not say positively they would all do so. In many cases they

(Testimony of J. A. Forehand.)

would be likely to fall across the track as well as the wires. Those are the principal duties of the station linemen. If there should be a severe storm which would cause more than ordinary damage to the line, additional men would be sent to make the repairs and place the line in first-class condition.

Q. Mr. Forehand, in the construction and maintenance of this telegraph line in the manner proposed by the petition here what interference if any, would be occasioned to the railroad company in the operation of its trains or in the uses of its right of way for strictly railroad purposes?

Mr. WINDERS.—I will object to that question, on the ground [50—24] that the witness has not shown himself qualified to answer.

The COURT.—I think a little better foundation might probably be laid.

Q. Mr. Forehand, have you had charge of the operating end of your telegraph line for a number of years, of the lines now on this right of way?

A. Yes, sir. I have directed the men in the matter of alterations, repairs, maintenance and improvements. If there was any serious interference with the operation of the trains or road, it would certainly come to my office as superintendent. If there were any requests or complaints by the railroad company of interference or injury, they would be reported to me. I have made it my business to be familiar with the workings of our line and of the operations in reference thereto. The operation of trains would not come under my observation, except if there had

(Testimony of J. A. Forehand.)

been an interference in any manner; then it would be brought to my attention. I frequently go over the line and inspect it.

Q. You have heard the petition read in this case?

A. Yes, sir.

Q. I will ask you to state to the jury what, if any, injury or interference or damage to the defendant company in the maintenance or operation of its right of way for railroad purposes would be occasioned by the construction and maintenance of your telegraph line as therein proposed.

A. There would be no damage or interference to the operation of the road. [51—25]

Cross-examination.

I am president of the petitioner in this case and verified the petition.

Q. (By Mr. WINDERS.) When you drew that petition, you drew it, read it and considered it with reference to the stipulations and matters that you agreed to do? A. Yes.

Q. The matters which you are stipulated to do are set forth in that petition? A. Yes.

Q. In what way does the line which you propose to construct differ from the line which you have now constructed?

A. The line that we will construct will perhaps differ a little from the present line for the reason that the present line is an old one whereas the other will be a new one, and will be built of entirely new material when we build the new line. The method of construction will be similar except that the pres-

(Testimony of J. A. Forehand.)

ent manner of construction provides that we use guy wires instead of guy stubs, which was formerly considered a proper method of construction in guying the poles.

Q. You ask the right to occupy a space between the outer edge of the right of way and within twenty feet of the track? A. I believe that is correct.

Q. Taking in on the average, how far are you now from the center of the track?

(Objected to as immaterial, and objection overruled.)

A. I should judge that the average at the present time [52—26] is about twenty feet, taking the entire line.

Q. Would you insist, as president of this company, upon the right to set your poles between the main tracks and the switch tracks?

A. That would depend entirely upon circumstances. I cannot imagine an instance or circumstance where we would insist that we should be permitted to put them there. In fact, we would prefer that they not be there.

Q. How often in the last five years have you been over this line?

A. I should judge it would average about once every three months. I go over the line on the train. We have four men on the line between Seattle and Sumas. I have had no experience in maintaining a pole line along a railroad right of way except in connection with the present line.

Q. Do you say that the location of your poles, say

(Testimony of J. A. Forehand.)

in the four blocks just south of the International boundary line, causes no inconvenience, incumbrance or damage to the railroad company as at present laid?

(Objected to and objection overruled.)

A. I would say that it caused no inconvenience to the railroad company. Had it done so they would have asked us to move it.

Q. Is it your testimony, knowing the conditions as you do along the team and delivery tracks of the Northern Pacific Railway Company from Evanston Street near the station of Fremont to Fifteenth Avenue, where the University is and where the mill company is, that your poles caused no inconvenience or incumbrance to the [53—27] railroad company?

A. I can only answer that by saying, we have had at various times requests from the railroad company to remove our poles, for the reason that they were in the way.

Mr. WINDERS.—I insist on an answer to my question. A. No, sir.

Q. Is it your testimony also that beyond the University grounds to Bothel and Woodinville your poles caused no inconvenience or incumbrance or damage to the right of way?

Mr. HUGHES.—I make the same objection.

The COURT.—The objection is overruled.

A. I don't think it caused any damage.

Mr. HUGHES.—I want to call the Court's attention to the fact that my objection is founded upon

(Testimony of J. A. Forehand.)

the proposition that past conditions are not the subject of the trial here; but the conditions that are bound to be observed under this proceeding.

The COURT.—I concede that that is absolutely correct, but both parties have constantly referred to past conditions—and I am going to permit the question to be answered.

Mr. HUGHES.—I take an exception to the ruling and also to the statement that so far as the petitioner is concerned it has done so beyond the preliminary matters involved in its petition.

Q. State to the jury whether there are numerous sawmills, shingle-mills and other industries along this track from Sumas to Fremont which are served by spur tracks leading off from the main track. [54—28]

A. There are a number of sawmills.

Q. With reference to the Nooksack river bridge and the logging roads where your poles are located with reference to the unloading platform on the north side of the new bridge of the Nooksack river, is it not a fact that they extend on that fill of ours and they are extending now up through those various platforms along there?

A. They may be there in some places.

Q. Is it your testimony to this jury that that causes no inconvenience, incumbrance nor damage?

Mr. HUGHES.—I object to that as incompetent, irrelevant and immaterial under the issues herein presented.

The COURT.—I think it is under the theory of

(Testimony of J. A. Forehand.)

the petition but not according to the manner in which the case has been tried.

Mr. HUGHES.—May I have it understood that to all like questions my objection will go, and I am not to be understood as waiving the objection if not renewed nor as acquiescing in the Court's position that the case has been so tried on our part.

A. I would say no. The reason I say no is the fact that the poles are about one hundred fifty feet apart and that they are not unloading logs along every foot of that space; that if a pole was in the way we would be requested to move it, or the logs would be thrown on it and knock it off. Having had no notice from the railroad company we would consider the pole is not in the way and is not causing them any inconvenience.

Q. Are you familiar with the situation of your poles in the town of Snohomish? [55—29]

A. Yes, sir.

Q. Where are they located with reference to the team and delivery track of the company?

A. Some of them are nearer than twenty feet to the delivery tracks. None of them are nearer than six feet. Starting at the coal-bunkers, from Third to Fourth and Fifth streets, beyond where the stock-yards are, the poles are about one hundred and thirty to one hundred and fifty feet apart. They are not an inconvenience or incumbrance to the railroad company.

The chief dispatcher would be advised of any interruption of our wires. If poles would cause any

(Testimony of J. A. Forehand.)

interruption in the use of the roadbed, our chief operator would be notified.

Redirect Examination.

Q. (By Mr. HUGHES.) Mr. Forehand, you have been asked as to the conditions at Sumas and you have testified in your opinion the poles are not an interference. Have you ever been asked by the railroad company to move those poles or alter their position?

A. We have not received any request from the company to move those poles from where they now stand. The Western Union also has a line on its right of way from Seattle to Sedro Woolley. Between Sedro Woolley and Sumas there is no other line upon the right of way.

Q. As to the situation, say at Pilchuck, if complaint were made to the railroad company or a request to change a pole, could you do so?

A. Yes.

Q. Would you do so? A. Yes. [56—30]

[Testimony of J. J. Lynch, for the Petitioner.]

J. J. LYNCH, having been first duly sworn, testified on behalf of petitioner as follows:

My name is J. J. Lynch. I am superintendent of construction for the Pacific Division of the Postal Telegraph System, covering the Pacific Coast territory west of the Rocky Mountains, and including the line of the Postal Telegraph Company of Washington between Seattle and Sumas. I have had twenty-five years' experience in this line of business.

(Testimony of J. J. Lynch.)

I first had charge of the construction and repairs for the Postal Telegraph Company on the Chicago and Great Western in Kansas, and also had charge of the maintenance of the Postal Telegraph lines on the Mobile & Ohio between St. Louis and Cairo, Illinois.

I started with the Postal Telegraph Company as a lineman out of Kansas City in 1888. Afterwards I was road construction foreman. Then I went to Kansas City in charge of the lines there. I served in Kansas City, in charge of their lines in that district from 1891 to 1900. The line ran from Chicago to Kansas City by St. Joe and Des Moines. The telegraph lines were on the right of way of the railroad company. In some places there was only one telegraph line, and in others more. The rights of way were from twenty-five to one hundred feet—possibly two hundred in some places. In the course of my duties it was necessary to look after the maintenance of the line with reference to its relation to the right of way of the railroad and to the operation of the railroad, and in reference to any obstruction to the uses by the railroad of the right of way and the operation of its [57—31] trains. I was brought in relation to the railroad company and its operation as to all matters affecting the mutual relations arising from the situation of a telegraph line on the right of way of a railway company. On the Mobile & Ohio right of way there were three telegraph lines. I was on that line from 1902 to 1905 and never knew of any interference because of the presence of any one of the telegraph lines on the

(Testimony of J. J. Lynch.)

right of way. I never knew of any injury or damage occurring to the railroad company from the construction, maintenance or operation of any telegraph lines on the rights of way where I had supervision of the telegraph lines. After 1909 I was transferred to San Francisco as superintendent of construction, covering the Pacific division. We have telegraph lines on the Santa Fe, Southern Pacific and the Northern Pacific. The Western Union is also on the railroad rights of way. I have been familiar with the line running from Seattle to Sumas since the early part of 1910. I was over the line three or four times that year, and twice each year since. I made a trip over the line about two or three weeks ago. I am familiar with the petition in this case and the manner in which, as there described, the Postal Telegraph Company of Washington proposes to construct and maintain the proposed telegraph line on the right of way of the Northern Pacific Railway Company between Seattle and Sumas.

Q. (By Mr. HUGHES.) I will ask you to state to this jury, assuming that the telegraph line were constructed and maintained in the manner described in that petition and the stipulations that are also set forth in that petition, [58—32] to what extent, if at all, would it interfere with the operation of the railroad? You may state to the jury fully if there is any respect in which it would interfere with the operation of the railway or inconvenience it.

A. I don't think it would interfere with or damage the railroad in any way.

(Testimony of J. J. Lynch.)

Q. To what extent, if at all, would it diminish or lessen the value of the use of the right of way, or lessen the uses to which the railroad company could put this right of way for railroad purposes?

A. Under our petition I do not see that it would damage them in any way.

Cross-examination.

Q. (By Mr. WINDERS.) You have been over this line about three times in 1910?

A. I went over it three or four times in 1910.

Q. And twice in 1911? A. Yes, sir.

Q. And how many times this year?

A. Twice this year.

Q. How would you go over the line?

A. On the rear end of a passenger train.

(Witness excused.)

Mr. HUGHES.—I offer in evidence a certificate of the Postmaster General of the filing of the acceptance by the petitioner of the provisions of the Post Road Acts of Congress, to apply to this telegraph line.

(Document received in evidence and marked "Petitioner's Exhibit No. 1.")

(Thereupon defendant rested.) [59—33]

Testimony for Defense.

[Testimony of Locke M. Perkins, for the Defendant.]

LOCKE M. PERKINS, having been first duly sworn, testified on behalf of defendant as follows:

My name is L. M. Perkins. I am engineer of maintenance of way for the Northern Pacific, and

(Testimony of Locke M. Perkins.)

have been connected with the engineering department of the Northern Pacific about ten years. I cover the lines west of Paradise, Montana. My duties are connected with general engineering matters in connection with the maintenance, addition and construction in that territory, and general advisory capacity in connection with the operating department, on maintenance matters.

I am familiar with the line from Fremont to Sumas. I have had occasion to go over it frequently both on wrecking trains and special trains making inspection trips, on hand cars on portions of it, and practically the whole of it on small gasoline cars, and parts of it on foot. I am familiar with the condition of the right of way and have become familiar with the expense of maintaining that right of way. I am familiar with the petition which has been filed by the Postal Telegraph Company, and also with their present occupancy of the right of way.

Q. I wish you would state to the jury, Mr. Perkins, the added expense, if any, in the maintenance of that right of way from Fremont Station to Sumas, by reason of the presence of the Postal Telegraph Company's poles, as contemplated under this petition?

A. The added expense has not been made an exact matter of [60—34] record by bookkeeping, but I would estimate from my general knowledge of the line in question and of the nature of it, that the specific and general items that add to the cost of the

(Testimony of Locke M. Perkins.)

maintenance on that line by reason of the presence of a pole line would make an annual amount of about fifteen dollars per mile.

Q. Explain to the Court and jury how you arrive at that figure.

A. I am taking into consideration the added cost of clearing the right of way from brush; the added cost by reason of the particular items of clearing and pulling the brush and inflammable material away from poles, to protect them from destruction by fire; the added cost by reason of the presence of poles between and adjacent to tracks, in the way of acting as obstructions to the handling of ties and tie renewal; the added cost by reason of the protection and care that is needed in the burning of old ties, and needed in order to protect the poles from fire and to protect the wire lines from damage; the added cost by reason of delays that occur in connection with construction, in waiting for poles to be moved, and the actual loss of the use of a certain amount of team track capacity by reason of poles being located beside team tracks and thereby preventing the use of a certain part of the team track, which is worth a certain amount of money to us, and to some extent the added risk by reason of poles being in close proximity to tracks and endangering the employees and others in connection with the operation of trains. [61—35]

Q. What is the character of the country through which this line runs?

A. It has been in the past very heavily timbered,

(Testimony of Locke M. Perkins.)

and it still is to some extent. There is, on the greater part of the line between Fremont and Sumas, a heavy growth of underbrush which grows to a height of six or eight feet in a year. There are short stretches of it which have been cleared—that is, cleared in the sense that practically reduced it to tillable land—but the greater portion is still covered with underbrush.

In the neighborhood of mile post 64 from Seattle there is some work at what we call Pilchuck in the way of some little change of line and considerable change of grade. At other points we have on our books changes supposed to be in progress but is not at present for lack of men.

Q. What is understood by a standard finish on the right of way?

A. That is immediately around and below the ties, varying depths we place gravel, and there is a certain prescribed way for dressing off the top of that gravel in order to get what has been decided by proper officials of the road to be proper drainage and the best dressing for preserving the life of ties and the most economical in general track maintenance.

Q. Are you making the standard finish of the right of way on this new work of yours upon the line at Sumas?

A. Well, on the Pilchuck work, when we get to that stage, and we intend to on considerable other portion of the line on which we have authority to ballast. [62—36]

(Testimony of Locke M. Perkins.)

Q. What has been the effect upon this roadbed maintenance of its occupancy in maintaining and rebuilding and constructing telephone and telegraph poles along the line of road?

A. Why, the employees of such companies traveling along a track break down the standard finish, requiring the labor of finishing it up again; and this is particularly true where they reconstruct a portion of their line.

Cross-examination.

(By Mr. HUGHES.)

The WITNESS.—I have had control of the line from here to Sumas as engineer of maintenance for about sixteen months. We intend to clear the right of way once a year. The whole of the right of way has not been cleared each year in the past. There is a great difference in the expense of clearing and burning the brush on different parts of the right of way. Near the towns, where there is little brush, the cost of clearing is small. Aside from such places, there is no material difference. The cost of clearing the right of way per mile is approximately \$150. I have never attempted to determine the actual cost of doing a single mile of that work. The expense comes from the fact that men have to be employed to cut the brush and other growth. As a rule, we pile the brush. As a rule, under the forestry regulations we have to pile it in little piles and burn it. From Sedro Woolley to Sumas there is a pole line only on one side of the railroad track. When we cut the brush on the other side of the

(Testimony of Locke M. Perkins.)

right of way we pile and burn it just the same as where [63—37] the telegraph line is. We use brush scythes and brush hooks and forks.

It is a common practice for people to walk along our railroad tracks. The telegraph employees break down our banks more when they walk along.

The presence of telegraph poles around our depots and sidetracks would not be any damage or injury if we were entitled to have them removed and they were removed. [64—38]

[Testimony of F. M. Smith, for the Defendant.]

F. M. SMITH, having been first duly sworn, testified on behalf of the defendant as follows:

I am roadmaster of the Northern Pacific at Seattle. I have the territory from Tacoma north through Seattle to Machias, including several branches. I was assistant engineer of maintenance of way for three or four years previous to being roadmaster. I have been roadmaster in Seattle for the past three years. As roadmaster my duties included maintenance of the roadway, track and upkeep of the right of way. I have various section foremen and extra gang foremen under me. I have been over the road frequently and am familiar with the line as far as Machias, about mile post 42 out of Seattle. There is another roadmaster from Machias to Sumas. The right of way in my district is more or less wooded and brushy in character and was at one time heavily timbered but is now clear of timber. I am familiar with the location of the Postal Telegraph Company poles; and am also fa-

(Testimony of F. M. Smith.)

miliar with the petition presented in this proceeding. It is a part of my duty to keep track of the expense of maintenance of the part of the road of which I have charge.

Q. (By Mr. WINDERS.) I wish you would state to the jury, Mr. Smith, having in mind that the proposed use of this right of way under which this proceeding is being tried, the added expense to the company of taking care of its right of way by reason of the presence of the poles of the Postal Telegraph Company as proposed to be constructed under the petition, and considering all the stipulations contained there.

A. Well, it would increase the cost of maintenance in [65—39] several ways. Places where our right of way is narrow, it would doubtless increase the cost of burning the old ties; that is, moving them to a place where sufficient clearance could be obtained from the wires so that we could burn them without injuring the wires and also in unloading our ties or piling them up; and in places where the brush is rather heavy in the cutting of the brush, we would have to pile the brush back from the poles and from under the wires so that when the slashing was burned it would not destroy the poles and the wires, and we have at various times when we do this burning to station men along to watch the burning so that the poles would not catch and burn up. And this labor represents dollars and cents and probably would increase the cost of maintenance considerably. In some certain sections in this burning and

(Testimony of F. M. Smith.)

slashing probably it would increase the cost from twelve to fifteen dollars per mile, and in the handling of our ties for burning narrow strips of right of way such as we have from Fremont to Bothel it would run into considerable money in a year, depending on the number of ties we put in. It would increase the cost probably one or two cents a tie for the handling. I have figures showing about one cent for the extra handling on account of finding a proper place to burn them.

In construction work sometimes we construct tracks and notify the telephone and telegraph company to move their poles and they delay doing it promptly, and we have had to build our track in such a way as to get around their poles and sometimes hold our crew a day or two longer on the job until they move the poles out and [66—40] we can line our track up to the proper position. And all these items in the aggregate amount to considerable money in a year's time.

Q. Give the jury some figures on the expense of cleaning this right of way per mile and taking care of it; what it costs you per mile by actual experience.

A. That is variable, of course, with the width of the right of way and the character of the growth on the right of way. I find that it costs me from eighty to one hundred fifty dollars a mile, according to the width of the right of way and the character of the material to be removed.

(Testimony of F. M. Smith.)

Cross-examination.

We usually clear our right of way in the fall and winter months after the rainy season starts. Brush in this country will grow from six to ten feet a year and on sidehill cuts where your line is in places three or four feet growth will reach your wires, and you cut the brush before the rainy season starts because when the brush is wet it will short circuit your wires. After the rain sets in and track work is made rather useless on account of the wet weather, we cut the brush and clear the right of way; our section-men clear the right of way. We do the clearing in the winter season. We have about the same number of section-men in the winter as in the summer. If we did not have the clearing to do the force would be reduced.

(Witness excused.) [67—41]

[Testimony of W. E. Bender, for the Defendant.]

W. E. BENDER, having been first duly sworn, testified on behalf of the defendant as follows:

I am section foreman at Deeming, mile post 110. That is about fifteen miles this side of Sumas. I have been engaged in track work about ten years, and seven years on this section. The extent of my section is ten miles. I am familiar with the expense of taking care of the right of way along the vicinity of Deeming. It was originally heavily timbered. We have a pretty heavy growth of brush on this section. Some miles have more than others. We have most all small brush, but mostly willows. It grows from six to ten feet a year on an average.

(Testimony of W. E. Bender.)

We have cleared parts of the section each year. It is our intention to clear the right of way yearly as much as we can.

Q. (Mr. WINDERS.) Have you made any computations, Mr. Bender, since this case has been called to your attention, and arrived at an estimate, based upon your experience and the time it takes and other matters with reference to the occupancy by this pole line—can you give the approximate additional expense, Mr. Bender?

A. I can give an estimate.

Q. I wish you would state that to the jury.

(Mr. Hughes objected to the question.)

Q. (By Mr. WINDERS.) Do you know about what the increased cost is?

A. Yes, sir, I know something about it.

Mr. WINDERS.—I ask that he be permitted to state about what the increased cost would be.

Mr. HUGHES.—In view of the varied testimony of the witness, it seems to me that it does not rise to the dignity of competent opinion, expert in its character. [68—42]

The COURT.—You may cross-examine him to show what it is based on. I will let him answer the question.

A. I would state about five per cent of the original cost of the clearing and work. I always do my work together—that is, I cut the brush and throw it away and as I burn it I keep it cleared away from the poles. In cutting brush we must keep it pulled away and carried away from the poles. Some

(Testimony of W. E. Bender.)

places we must carry it some distance and other places just away from the poles, and then in burning it we must keep the fire away from the poles, and where the poles get on fire I always take men back there and put out the fires over the right of way, where we burn the brush, and I would estimate about five per cent of our work would be in the care of the poles and removing the brush.

Q. About what is the expense per mile for clearing upon your section?

A. Where I noted the cost of clearing it is about one hundred and fifteen dollars per mile.

Cross-examination.

Q. (By Mr. HUGHES.) The brush grows very thick in your section?

A. Parts of it, yes. It was about three years ago that I kept track of the cost of clearing one mile. I wanted to see what it cost and I commenced at the mile post and worked steady at that and just kept track of it to see what it cost. Don't know how many days it took or how many men I had working. I think I worked five men.

Q. You do not remember what it cost exactly?

A. I said something like one hundred fifteen dollars. [69—43]

The right of way was one hundred feet wide. The railroad track was in the center. I don't know how much time it took on each side of the right of way; didn't keep it separate. There was about the same amount of brush on one side as the other. We worked part of the men on one side and part on the

(Testimony of W. E. Bender.)

other. I don't know whether it took the same length of time on one side as the other. We had to pile up the brush on both sides. The right of way is fenced, and we had to carry the brush back to keep it from burning the fences down. In some places we did not have to move it. We had to pile it up to burn it. I know that under the law we have to keep men watching our fires to see that they are guarded from spreading to the adjacent ground. We always watch our fires on both sides of the track. We do not clear all the brush on the right of way every year.

(Witness excused.)

[Testimony of W. H. Gale, for the Defendant.]

W. H. GALE, having been first duly sworn, testified on behalf of defendant as follows:

I am in the employ of the Northern Pacific Railway Company as roadmaster; a little over eleven years. I have been engaged in railroading and track work thirty-five years. I have charge of the line from Machias north to Sumas. I have been in charge over eleven years. My duties are general repairing and looking after new work and improvements. I have charge of the section-men and extra gang, having to do with the maintenance of the track and the right of way. They report to me. I am familiar with the expense of maintaining the right [70—44] of way of the defendant from Machias to Sumas. If the right of way was cleared each year it would cost in the neighborhood of one hundred to one hundred fifty dollars per mile. We

(Testimony of W. H. Gale.)

clear so much every year. The average cost on my division would be one hundred dollars per mile annually; we cannot do it for less. I have read the petition in this proceeding and am familiar with the stipulations contained in it.

Q. (By Mr. WINDERS.) I will ask you if you can state to the jury what, if any, added expense there would be annually in clearing and caring for this right of way by reason of the construction, reconstruction and maintenance of a line of poles as proposed in this petition. You may state to the jury the amount per year.

Mr. HUGHES.—I object, for the reason that the witness has not shown himself competent, and because it is speculative and remote and inappreciable.

(Objection overruled.)

A. Well, we have right of way on a part of our track that we have no poles on, and if we go once a year and cut that brush we can cut it irrespective of where it falls. We can let it fall anywhere except next to the fences. When the men are cutting brush they let it fall away from the fence. We do not make any pretense of piling the brush to burn it because it dries out better, and after we come to burn it we can get a better burn because it burns every weed on that right of way. It is our desire always when we burn it—it not only helps to burn the brush but it sets it back by burning the roots, and where you have a line of poles you have to protect those poles by cutting around the poles and

(Testimony of W. H. Gale.)

throwing the stuff back a sufficient distance to save the poles. We have [71—45] always done it. That has been the practice, and it is quite an item when you come to clear a right of way to clear away and keep it away and save the poles while you are burning it.

Q. About how much a mile, Mr. Gale?

(Same objection.)

A. I would say at least ten or twelve dollars per mile, easily, for the difference in pulling away the brush. There have been a great many of the telegraph company's poles on fire at one time or another. The matter of extinguishing the fires requires labor. I never knew the telegraph company to furnish men to watch the poles or pull back the brush when they are burning, or to clear any of the right of way except to chop down a few of the tops which might be reaching up to the lower wires. We have to cut it off again just the same and it takes more work to do it.

Cross-examination.

Q. (By Mr. HUGHES.) Mr. Gale, what portion of your road runs through cuts?

A. Well, probably one-third of the distance.

Q. What portion of it would be fills—a quarter?

A. Well, yes, take the side fills.

Q. I am talking about the fills where your road-bed is above the level?

A. That is easily a quarter, or more.

Q. Have you cleared all the right of way this last year?

(Testimony of W. H. Gale.)

A. No, sir, but we cut considerable; possibly about one-third.

Q. What portion of it did you clear last year?

A. About the same, I should judge. [72—46]

Q. When do you burn the brush?

A. Prepare to burn it along in May. A good deal of it is burned by the engines setting fire to it. We burn it all over if we can get the time to burn it. The more we burn it the more it kills the brush on it. We cut it mostly in the winter time.

Q. You spoke of poles being burned; that most of the poles have been burned some time or other.

A. They have been on fire; burned around. You can get brush and pile it up, but the heat is going to catch the pole if you allow it within seven or eight feet. You have to carry the brush away from the poles a reasonable distance. Whenever a fire starts on the right of way our section-men are supposed to go there. A good many poles have burned down; that is when the men were not there. Grass will start a pole on fire, and if a fire starts when the section-men are not there, you cannot help it. That is when the fire catches from the engine or some other cause. If we burn the brush we take care of the poles.

Q. Now, Mr. Gale, I want you to tell this jury whether you ever took note of a single mile, as to the time that it took you to clear one side where the right of way did not have a telegraph line, and the time it took you to clear the other side where it did.

A. No, sir, not particularly, I did not. Anyone

(Testimony of W. H. Gale.)

knows that a pole line is a hindrance to men going along where they have to cut and pull back brush. If there were any poles on the other side I would have to pull the brush.

Redirect Examination. [73—47]

Q. (By Mr. WINDERS.) State to the jury what difficulties you encounter in burning old ties by reason of the presence of this telegraph line.

A. Well, I can't say that on our line it would be any great amount up there. There is only one line and they are pretty well up from the ground. It is not like where the line is loaded down with wire close to the ground. Of course, we make it a rule not to pile any around or close to the poles so as to endanger the pole or put too big a pile under a string of wires. There is lots of times there is twelve feet from the track generally to where we pile our ties, and we make it a rule to put them over on the other side; that is, unless the wires are sufficiently high to be out of danger.

Recross-examination.

Q. (By Mr. HUGHES.) What do you do with the ties through those cuts when you remove them to burn them?

A. You take them out to the end of the cut; sometimes we pile them up in it, a few ties at the time, and burn them right in the cut, but you can only burn a few at the time.

Q. How wide are your cuts?

A. Twenty feet, and sometimes more.

Q. How wide is the roadbed?

(Testimony of W. H. Gale.)

A. As a rule, about eighteen feet on the fill and lots of places twenty.

Q. How many do you usually put in a pile when you burn?

A. Sometimes, burning in the cuts you can't put over ten or fifteen ties. Outside we sometimes, where we have the place, pile up thirty or forty or fifty—where you [74—48] push-car them up.

Q. Tell us about the added expense.

A. Where did I say that it costs us any more to handle the ties on account of the poles?

Mr. WINDERS.—You say there is only one pole line there.

A. That is what I said, and I do not say that it costs any more on that account on my district.

[Testimony of R. J. Rhodes, for the Defendant.]

R. J. RHODES, having been first duly sworn, testified on behalf of the defendant as follows:

I am section foreman at Arlington; have been section foreman for seven years. Have been familiar with track work over thirty years. I commenced work for this company in 1890. My section is seven and a half miles long. I am working under Mr. Gale as roadmaster.

Q. (By Mr. WINDERS.) Are you familiar with the location of poles as proposed to be constructed by the Postal Telegraph Company in this case?

A. I am.

Q. Can you advise this jury, taking it upon your own section, what the additional expense per year would be in the caring for that right of way by rea-

(Testimony of R. J. Rhodes.)

son of the construction of those poles as proposed and their maintenance by the Postal Telegraph Company?

A. Well, if my experience would teach me, it would be from eight to twelve dollars per mile.

Cross-examination.

Q. (By Mr. HUGHES.) You were section foreman under Mr. [75—49] Middaugh, who testified here?

A. I was; yes, sir. It costs more now to clear a right of way than it did when he was roadmaster. The price of labor is much greater, and as the material becomes accumulated on the right of way by growth from year to year it becomes much harder to clear it.

Q. Do you mean to say, if you clear it properly each year that it does not become less and less difficult to clear? A. It is never cleared properly.

[Testimony of Herman Ridell, for the Defendant.]

HERMAN RIDELL, having been first duly sworn, testified on behalf of the defendant as follows:

Q. (By Mr. WINDERS.) You are in the employ of the defendant?

A. I am section foreman at Hartford. I have been section foreman for the defendant seven years. My section is between Hartford and Darrington. I have been familiar with the track and right of way work nineteen years; and worked on the line between Fremont and Sumas about six years. The right of way over my section is very brushy.

(Testimony of Herman Ridell.)

Q. You are familiar, Mr. Ridell, with the petition in this case; that is, the rights that the Postal Telegraph Company are attempting to acquire to a pole line along this line, and a line anywhere from the outer edge of the right of way to twenty-five feet of the track? A. Yes.

Q. Are you able from your experience to testify to this [76—50] jury the added expense per mile per year of the annual maintenance of this right of way by reason of the proposed construction, reconstruction and maintenance of that telegraph line? A. Yes.

Q. You may look at the jury and state to them what, in your opinion, is the added expense per mile.

A. I figured an extra expense of eight dollars per mile. I would take it for all the expenses in all cases, such as throwing away brush, piling ties, unloading cars and such like. In cutting brush on the right of way with the telegraph line there we are subject to hitting those poles with the scythe or the brush-hook, and throwing the brush away from the poles, say from four to six feet. Then we come along in a month or two or three months after and burn it, and then we have to protect those poles from burning from the flames of the fire, as those poles have a light hair on the bottom, and the flames being so high that it touches those poles and it blackens it, and then we are compelled to outen those poles now and then.

Q. How about your working in the yards?

A. There is places in the yards where we have to

(Testimony of Herman Ridell.)

shovel cinders from the main track or side track where those poles are close; for instance, like Hartford, the poles are six feet from the rails. We must throw those cinders out over two or three tracks, which sometimes interferes with the pole. Those cinders are warm or hot, and they are liable to burn the pole and therefore we have to carry those cinders three or four or five feet farther. This is also added to the extra expense. [77—51]

Q. (By Mr. WINDERS.) Have you had other experiences where the poles would reach the track?

A. Yes.

Cross-examination.

Q. (By Mr. HUGHES.) How many men are there under you?

A. From three to eight. Certain times of the year when the traffic is light we are allowed three men and when traffic is heavy or bad weather or such like, we are allowed more; generally in the fall and spring, on account of bad weather and cutting brush.

Q. What time do you cut the brush?

A. One year I cut the brush commencing the last part of June, and July and August. That was in 1909. I cut three miles, from mile post 45 to mile post 48.

Q. What time of the year did you cut it in 1910?

A. About the same time. We didn't cut all of the right of way but we did cut here and there a patch; and I cut the three miles over again which I cut in 1909.

Q. What time did you cut in 1911?

(Testimony of Herman Ridell.)

A. In July and August and part of September. We cut about four miles—in patches. We did not have time to cut it all, but we took the worst of it.

Q. In the year 1912 what proportion of your right of way had you cleared?

A. I cut the brush from one end to the other twenty feet from the outside rail on both sides of the track. I did that during June, July and August. In April and May, 1910, I burned three miles that I slashed in 1909. I didn't burn much in 1911—only here and there. We haven't burned any of what was cut last year or this [78—52] year; cannot burn it before next April or May.

Q. Do you have as many men in the winter time as you have in the fall?

A. No. I have about the same number in the spring as in the fall. I have the most men in the fall and spring.

Q. One of the large items of expense here is shovelling cinders, I believe; is that right?

A. Yes. We generally shovel cinders while they are hot. We have to get them away from the track or they would burn the ties out, so we put them where they will not cause fire elsewhere; generally dump it right opposite one of those telegraph poles. If they were put somewhere else we would not have that trouble.

[Testimony of John Walsh, for the Defendant.]

JOHN WALSH, having been first duly sworn, testified on behalf of the defendant as follows:

Q. (By Mr. WINDERS.) You are in the employ

(Testimony of John Walsh.)

of the Northern Pacific Railway Company?

A. Yes. I am section foreman; located at Snohomish; have been in the employ of the company twenty-six or twenty-seven years; worked on the section at Snohomish about ten years. Have heard this petition read and know what the telegraph company is endeavoring to acquire in this proceeding. I have had charge of the work done in my section; the work of maintaining the track and clearing and caring for the right of way. Am familiar with the proposed location of these poles.

Q. Are you able to give this jury the additional cost, if any, in caring for your right of way annually by reason of the presence of the poles of this company as proposed [79—53] to be constructed and under the stipulations as contained in this petition?

A. Yes.

Q. Will you give the jury your opinion on that matter?

A. I think the cost would be about in the neighborhood of twelve or thirteen dollars annually per mile in maintaining the right of way, owing to the present condition; owing to the Postal service in maintaining their right where they cross our right of way.

Cross-examination.

Q. (By Mr. HUGHES.) How many men do you have under you?

A. Usually from six to eight. My section runs both ways from Snohomish. Part of it is open country, without much timber on either side and

(Testimony of John Walsh.)

free from brush—but not all of it.

Q. I asked you when, how and where you figured out the amount of extras and extra cost it would be, what the items would be which would aggregate so much money?

A. Because my experience daily in my work tells me the cost in maintaining those on the right of way of the present line; and they should have their equal share in maintaining that line, and why should we be accountable for it?

Q. When did you attempt to compute the items of the extra expense and what would make the expense greater? Did you figure that out at all before you came here? A. No, sir.

Q. Before you went on the witness-stand?

A. No, sir; I don't know that I have.

Q. So that you did not give this matter much consideration? [80—54]

A. I haven't considered it at all. I have just listened to the proceeding.

[Testimony of E. E. Dildine, for the Defendant.]

E. E. DILDINE, having been first duly sworn, testified on behalf of the defendant as follows:

Q. (By Mr. WINDERS.) What is your employment?

A. Assistant superintendent of telegraph for the Northern Pacific Railway Company; have been connected with the telegraphic department for twenty-six years; about thirteen years as railway and commercial telegraph operator, and thirteen years as assistant superintendent of telegraph. As assist-

(Testimony of E. E. Dildine.)

ant superintendent my headquarters were at Tacoma for about two years and since then at St. Paul. I am familiar with the various telegraph and telephone and other wire lines along the Northern Pacific system; and am familiar with the petition in this case and the rights they are seeking to acquire.

(Certain questions were propounded to this witness and objections sustained by the Court.)

Q. What elements, what things cause, or what facts will cause interference or damage or injury to the operation of the road and the use to the railroad company?

A. The falling of trees and the inconvenience of the poles in that location. I do not see anything additional to that. [81—55]

[Testimony of Joseph Smith, for the Defendant.]

JOSEPH SMITH, having been first duly sworn, testified on behalf of the defendant as follows:

Q. (By Mr. WINDERS.) What is your business?

A. Right of way agent for the Northern Pacific Railway Company. I am familiar with the value of the right of way along this Seattle-Sumas line. I made investigation as to the values along the right of way; am familiar with the amount of taxes we pay per year per mile.

(Questions were then propounded to the witness concerning the value of the right of way and the valuation by the State Tax Commission and the taxes paid by the railroad company; to which objections were sustained by the Court.) [82—56]

. [Testimony of J. E. Craver, for the Defendant.]

J. E. CRAVER, having been first duly sworn, testified on behalf of defendant as follows:

Q. (By Mr. WINDERS.) Mr. Craver, what position, if any, do you occupy with the Northern Pacific Railway Company?

A. Superintendent of the Seattle Division. The Seattle Division includes the right of way covered by the petition, running from Fremont to Sumas. I have been engaged in the railroad service 31 years, 26 years with the Northern Pacific. I was telegraph operator for about 8 years; chief train dispatcher a little over 6 years; trainmaster about 3 years and 8 months, and superintendent over five and a half years; have been superintendent of the Seattle Division two years. I am familiar with the right of way and track running from Seattle or Fremont to Sumas. The rights involved cover only between 120 and 121 miles.

As superintendent, it is necessary for me to look after the running of the trains and the maintenance of track and buildings. The roadmasters work under my directions. There are two on this line.

I presume in the last two years I have been over the line between here and Wickersham perhaps fifty times; between Wickersham and Sumas I have not been over it so often. I have been over it on regular and special trains, and on the gas car.

Q. I wish you would give to the jury the average cost per mile of caring for the right of way per year, in the way of keeping it clear and free of combustible material.

(Testimony of J. E. Craver.)

A. It would run from eighty to one hundred fifteen dollars a mile per annum. Now, I am speaking of a right of way [83—57] one hundred feet wide, which contains 12.12 acres. Of course where the right of way is less than that the cost would be proportionately less, but a considerable portion of this right of way is one hundred feet wide. We had thought it might be advisable to clear all of this right of way, provided we could get anyone to put in figures on it. The figures that I have quoted here were compiled so that it would place us in a position to pass on possible bids for this work. The figures I have given are the actual cost, as checked by our men mile after mile.

Q. Are you familiar with the proposed location of the Postal Telegraph Company's poles and the stipulations under which they desire to occupy our right of way?

A. No, I cannot say that I am familiar with the proposed location. I read the petition.

Q. It is pretty difficult for you to know where they are going to place them?

A. Yes; I don't know.

Q. Well, take it that they have got the right to put them between those points anywhere on this right of way from a point on the edge of it to twenty-five feet of the track, and they say they are going to maintain them as well as they have in the past; are you in a position to give this jury an opinion of the additional cost of clearing that right of way by reason of the presence of those poles to be con-

(Testimony of J. E. Craver.)

structed as proposed in their petition, the additional cost to be the annual additional cost? I mean what is the additional cost now and is there any additional cost in doing this clearing by reason of those poles being on the right of way? [84—58]

A. I should say from ten to twelve dollars. I am familiar with the location of their poles at Sumas and at the town of Snohomish, and the location of their poles generally along our right of way between the various switch tracks and main line tracks.

Q. What effect, if any, upon the operation of this system does the presence of those poles have upon the right of way?

A. It decreases the use of our track, when they are not placed a sufficient—this refers to team tracks—it decreases the use of our track when the poles are not placed a sufficient distance from the track to permit of the passage of teams.

Q. I will ask you this question, Mr. Craver: If the range of territory over which this company under this decree are required to place their poles, upon the outer edge of the right of way or five feet from the outer edge of the right of way, and their cross-arms sticking over to the right of way edge to a point within 25 feet with their poles and 20 feet with their cross-arms, would impose a greater burden on the right of way than if there was a straight line of poles.

Mr. HUGHES.—I object to that question as incompetent and immaterial.

(Argument.)

(Testimony of J. E. Craver.)

The COURT.—I think he may answer that question.

A. The pole line, in my opinion, should be placed upon the edge of the right of way; that is, within five feet from the edge of the right of way. It would be very much [85—59] better if it could be in a straight line and there should be as little crossing of the tracks as possible.

Q. The evidence has shown in this case the presence of telegraph lines as they exist along this line and also the question of the burning of old ties in addition to the burning of the right of way and the clearing of the right of way. I wish you would state to this jury, as an experienced railroad man and one familiar with the maintenance and upkeep of a right of way, whether or not in taking care of the old ties that are taken out necessarily in the renewal and reconstruction of this railroad line, any additional expense is imposed upon the company in burning or otherwise disposing of them, by reason of the construction and maintenance of the line as proposed in this petition by the petitioner.

A. There is some additional expense in burning old ties taken out of the track, by reason of having to place them at a point where they will not endanger the poles or the wires. They very often have to be carried a greater distance on this account, and, of course, the carrying of material of any kind costs money.

Q. Mr. Craver, I wish you would state to the jury from your experience as an operating man what, if

(Testimony of J. E. Craver.)

any, added expense or incumbrance or embarrassment there is under which this line would be operated by reason of the danger of the falling of poles and the like—poles to be constructed as provided under this petition.

Mr. HUGHES.—I object to that as incompetent, irrelevant and immaterial and because it is too remote and contingent and uncertain. [86—60]

(Objection overruled. Exception noted.)

A. Yes, sir, I have known of a number of cases. The particular case I am going to talk about, I was there. Something like a year ago the roadmaster, Gale, and I were just above McMurray; there was a forest fire which had come in off the hill and had burned down a number of telephone poles which we found lying across the track with the wires badly tangled. We arranged to afford protection to our trains and sent after the section-man, and Mr. Gale and I stayed there and tried to connect some of the wires together, and, of course, had the poles removed from the track. The reason those poles fell on the track was because they were placed so close that they did not clear it when they fell.

Q. Mr. Craver, describe the conditions along this right of way between Fremont Station and the city limits, and what the conditions will be when this right of way is occupied as proposed by the petitioner in this petition, and the effect it will have upon the use thereof by the railroad company for railroad purposes.

A. We have fifty feet of right of way from Evans-

(Testimony of J. E. Craver.)

ton Street to the University grounds—from Fremont Station to the University grounds—I do not know what we have in the University grounds, and I guess no one else does. This right of way is used by a great many industries. There are quite a number of tracks leading off from the main line, to which we switch cars for business concerns; and the pole line now, in my opinion, crowds this right of way to a great extent in this particular territory and [87—61] that imposes a hardship on the railway company. To reduce this damage to dollars and cents would, perhaps, be impossible, but the fact does remain that in this particular district that the pole line inconveniences us on account of the lack of room.

Cross-examination.

Q. (By Mr. HUGHES.) Mr. Craver, you testified that with the telegraph line on there there will be some additional expense in keeping that cleared.

A. I did.

Q. Will you tell the jury what causes that additional expense?

A. In clearing the right of way it is necessarily harder to cut around the poles, and, whether we have been obligated to do it or not, we have seen to it that the telegraph poles and the telegraph lines were kept as free from damage as possible.

When I say it is harder to cut around the poles I mean that you must drag the brush away from the poles and out from under the wires where they are low, so that you will not burn the poles or burn the

(Testimony of J. E. Craver.)

wires off. The wires are usually high enough, but not always.

Q. If they are 20 or 25 feet high there is no trouble?

A. Not on this line they are not that high.

Q. Under this proposed condemnation?

A. They should be, but they are not.

Q. I am talking about this proceeding.

A. Yes. [88—62]

Q. Do you know from personal experience whether it would take any more time to go over a given space of ground with the telegraph poles in there every 165 feet than if they were not there?

A. No, sir; I never used a brush-hook.

Q. Now, you spoke about the expense of pulling out the brush and piling it—do you know what they do in that particular?

A. I know they do not pull it away and pile it to any great extent except to get it from the telegraph poles. They do not pile it in piles under ordinary conditions because it is not necessary.

Q. If the law requires you after you clear and cut your brush to pile it and burn it, then this piling does not cut much ice, does it?

A. Only as regards getting it away from the fences and the telegraph wires and the poles.

Q. When you pile brush you have got to get it away from where it was before to make a pile of it?

A. Yes.

Q. You spoke of poles at Sumas and Snohomish being an interference and an inconvenience to

(Testimony of J. E. Craver.)

wagons; to what wagons?

A. I mean the wagons of customers going to the team track to get freight to be loaded in their cars. It is an inconvenience to us in transacting business. We do not spot a car with the door in front of a pole.

Q. If under this new condemnation there is no connection with your depot stations and these poles are in your way and are removed out of it and farther off your right [89—63] of way, then that objection would not exist.

A. No, not if you put them where they are absolutely out of the way, if that is possible.

Q. And it would not be necessary to have them run into your stations if they do not connect with your station and furnish a wire for your station, would it? A. No, it would not be necessary.

Q. You spoke of burning ties. I will ask you first how often you have to renew ties.

A. The tie renewal in that piece of track is 18 per cent per annum; in other words, the ties are renewed entirely about once every six years. We lay about twenty-six or twenty-seven hundred ties to the mile, two-foot centers. The ties are seven by eight inches and eight feet long. We are renewing ties constantly along each section of the line along the right of way or track in the section. Tie renewals are ordinarily handled during the summer. An average renewal of ties is three or four to the rail. The rails are thirty feet long and there are sixteen or seventeen ties to a rail.

Q. You testified about the instance when there

(Testimony of J. E. Craver.)

was a forest fire and some telegraph poles came down across your track—where was that?

A. Just north of McMurray; it caught from the underbrush. One or two of these poles at least were up on the hill side; at least four of them reached the track. It might have been that they were Western Union poles.

Q. You have never had an accident in consequence of the falling of a telegraph pole.

A. Nothing only the slight one which you have not let me [90—64] testify about.

Q. That was the only instance in your thirty years' experience that you know ever occurring to cause any damage or injury to the railroad company? A. No, sir; I would not say that.

Q. Within your experience and knowledge it is the only one you know of?

A. No, it is not the only one. I have known of a number of them.

Q. Where any damage was caused?

A. Engines running into the poles. Of course, I do not remember any serious accident caused. There was one other time on the Bellingham branch—I do not know who the pole belongs to. I am saying that it is dangerous when you permit poles to be near enough to a track so that falling poles will strike the main line—there is that additional hazard.

Q. You spoke of the conditions between Fremont and the city limits—you also have the Western Union line on your right of way? A. Yes, sir.

(Testimony of J. E. Craver.)

Redirect Examination.

Q. (By Mr. WINDERS.) Mr. Craver, I wish you would state to the jury, in doing that work that is being done around the Pilchuck where you are cutting out the grades and making a new fill, whether or not in doing that work, irrespective of the fact of obligations similar to those contained in this petition, if there is any added expense in making your fills around those poles or making your [91—65] cuts under the poles.

Mr. HUGHES.—I object to that as irrelevant, immaterial and incompetent.

(Objection overruled. Exception noted for plaintiff.)

A. I instructed them to use every care in protecting the poles, and necessarily it cost us some additional money to do this. This material we are taking out is filled with rocks, and we have to watch it or it would knock the poles down when the plow plows off the material.

Q. I will ask you further, as superintendent of this division, the character and amount of work that is going to be done on this Sumas line, and that is now authorized to be done and the amount of money that will be expended.

Mr. HUGHES.—I object to that as contingent and remote.

The COURT.—I will permit him to answer the question, and you may cross-examine him as to the effect under the stipulation.

A. In doing this work between Wickersham and

(Testimony of J. E. Craver.)

Sumas, there is no question but what it will be necessary to move a large number of poles to enable us to do the work. If this work is done promptly by the Telegraph Company before we get ready to start operations, I cannot say that it will cost any more money to do the work. If there is any delay in moving the poles, the work will necessarily be more expensive on account of the delays.

Q. Mr. Craver, I would like to ask this question: This work that is being done will be carried out there—will that affect this right of way—making the fills and cuts outside of a point 25 feet from the track? A. Yes; in some instances. [92—66]

Cross-examination.

Q. (By Mr. HUGHES.) How wide is your right of way along there? A. 100 feet.

Q. And your track is how wide?

A. About 14 feet actually occupied by the track and the grade slopes to the ties.—The track itself is four foot eight and a half inches—that is, between the rails.

(Witness excused.)

Mr. WINDERS.—I again offer in evidence exhibit “C” for identification, being the contract under which this line has been occupied from 1888 to the present time.

Mr. HUGHES.—We renew our objection.

(Objection sustained.)

Here the defendant rests. [93—67]

Rebuttal Evidence.

[Testimony of E. Colburn, for the Petitioner (in Rebuttal).]

E. COLBURN, having been first duly sworn, testified on behalf of the petitioner as follows:

Q. (By Mr. HUGHES.) What is your business, Mr. Colburn?

A. Civil Engineer. From 1871 to 1880 I was locating engineer for railroad construction; came to this State in 1899, and I have lived in Snohomish and practiced my profession there since that time. I have been city engineer of Snohomish and Monroe; have surveyed logging roads in this State. I surveyed a water line for the city of Snohomish over sixteen miles of defendant's right of way.

Q. What is its condition between Fremont and Sumas as to the growth of weeds, grass and brush? I mean as to the character of the land. I am not attempting at this point to go into its present condition, as a matter of fact, but its condition as to its susceptibility of growing weeds and grass and brush, and the character of the land in that respect.

Mr. WINDERS.—I object to it on the ground that it is not rebuttal.

The COURT.—I will sustain the objection.

Q. (By Mr. HUGHES.) Are you familiar in your experience as an engineer, both on and off this right of way survey and otherwise, with the matter of cutting brush on such ground as this right of way, brush and weeds or bracken, or whatever grows on such right of way? A. Yes.

(Testimony of E. Colburn.)

Q. I will ask you to state what, if any, would be the [94—68] labor or trouble in clearing the right of way of brush and other undergrowth that grows in a season or two, with telegraph poles strung at intervals along on the right of way than without them?

Mr. WINDERS.—I object to that on the ground that it is not rebuttal, and on the further ground that he has not shown himself qualified to answer the question.

(After argument of counsel.)

The COURT.—I think the questions which you are propounding, if not gone into in the first instance, were part of your case in the first instance and I do not think it is proper rebuttal. The objection is sustained.

Mr. HUGHES.—I take an exception.

The COURT.—The exception is allowed.

Q. (By Mr. HUGHES.) Would it take any more time to cut the brush on the right of way where there were telegraph poles than where there were no telegraph poles?

(Same objection; same ruling and exception.)

Q. Are there any irregularities upon the surface, barrow-pits and other irregularities on this surface where those weeds and brush grow?

(Same objection; same ruling and exception.)

Q. Are there logs and stumps on this right of way?

(Same objection; same ruling and exception.)

Q. In cutting brush on such a right of way, is

(Testimony of E. Colburn.)

more labor required to cut with the ordinary instruments that are used for that purpose where the poles stand than there would be to cut the growth which would appear at that place, that area, if the poles were not there?

(Same objection; same ruling and exception.)

Mr. HUGHES.—I am asking these questions for the purpose of my [95—69] record. I desire to say that I have several witnesses by whom I expect to prove the matters that I would expect to prove from this witness by an answer to these questions, and that I will not place them upon the witness-stand, assuming that the ruling of the Court would be the same as to this witness.

(Witness excused.)

[Testimony of J. J. Lynch, for the Petitioner (in Rebuttal).]

J. J. LYNCH, having been first duly sworn, testified on behalf of the petitioner in rebuttal as follows:

Q. (By Mr. HUGHES.) Were you on the witness-stand before? A. Yes, sir.

Q. Have you made an examination for the purpose and can you now testify as to the width of the right of way, that is, how many miles of it and what portion of it is one hundred feet and what portion fifty and what portion twenty-five?

A. Yes, sir, I have made examinations.

Q. I wish you would now state how many miles—what portions of the right of way are one hundred feet and what portions are fifty and what portions

(Testimony of J. J. Lynch.)

are twenty-five feet wide.

A. Well, I have a copy; after looking at it I can state accurately.

Q. All right; do so.

Q. (By Mr. WINDERS.) Where did you get your data? A. From blue-prints.

Q. Whose blue-prints?

A. Furnished by the Northern Pacific Railway Company to the [96—70] State office.

Mr. WINDERS.—I will object to the testimony.

Mr. HUGHES.—On the theory that the blue-prints which you furnished would not be correct?

Mr. WINDERS.—I object on the ground that it is irrelevant, immaterial and incompetent, and on the ground that it is not proper rebuttal.

Mr. HUGHES.—It was not material in the main case to prove the width of the right of way. Their testimony in the defense has been of such a character that I think it would be of aid to the jury in this case to know what are the widths of the right of way, and it is for that reason that we offer it now in rebuttal, inasmuch as they did not offer it.

Mr. WINDERS.—That was testified to by Mr. Perkins.

Mr. HUGHES.—He only gave approximations and this is specific testimony.

Mr. WINDERS.—I will say to Mr. Hughes that I want an opportunity to check up the record and if it is not in the record all I want is the right width. I do not think it is in the record, but there should

(Testimony of J. J. Lynch.)

be no difficulty in regard to the width of the right of way.

Mr. HUGHES.—These figures have been taken from the blue-prints filed with the Public Service Commission by you.

(Whereupon counsel for defendant and counsel for the plaintiff compare notes as to the figures produced by the witness.)

Mr. WINDERS.—I will insist on my objection, if your Honor please.

(Objection sustained. Exception noted for plaintiff.)

Q. Have you had any experience in cutting brush on the [97—71] right of way of a railway?

A. Yes, sir.

Q. For how many years?

A. I have had actual experience myself, either as a lineman or foreman for seven or eight years, or something like that.

Q. Does the cutting of brush on a given area cause more labor where telegraph poles stand than where they do not?

(Objected to as not rebuttal. Objection sustained. Exception noted for plaintiff.)

Q. Would it take more time?

(Same objection. Same ruling and exception.)

(Whereupon both sides rest and the testimony is closed.)

Thereupon the petitioner and the defendant each filed with the clerk of the court their respective

requests in writing for instructions.

After argument of counsel to the jury, the Court gave the following written instructions to the jury:

[Instructions.]

The COURT.—Gentlemen of the jury: In this cause it was admitted by the defendant that the allegations contained in the first and second paragraphs of the petition are true, and all of the allegations in the third paragraph of the petition, except the portion alleging that the right of way is fifty feet in width on each side of the line of the railroad throughout its entire length, and there was no necessity for introducing any testimony [98—72] in support of those allegations.

You are hereby instructed that in this proceeding the petitioner, Postal Telegraph-Cable Company of Washington, seeks to condemn an easement or privilege along, upon and over the right of way of the defendant, Northern Pacific Railway Company, for the construction or re-construction and for the maintenance and operation of its telegraph line from the intersection of Evanston street near Fremont station, in the city of Seattle, through the counties of King, Snohomish, Skagit and Whatcom, to the international boundary line at the north end of the depot building of the said railway company in the town of Sumas; its poles to be erected as near the outer edge of said right of way as circumstances will permit, and in such position as not to interfere with the operation or safety of trains or with the use of the right of way by said railway company, or its lessees, for its or their own purposes; that the said

petitioner proposes in this proceeding to condemn only so much of said right of way between the points and through the counties aforesaid as may be necessary for its uses for the purpose of constructing or re-constructing, maintaining and operating its telegraph line along, upon, over and across said right of way; said telegraph line to consist of a single line of poles not less than twenty feet, nor more than thirty feet, in length, including length underground, except at highways or where obstructions exist, where the poles will be of such height as may be required by statute or necessary because of physical conditions existing, or to protect other wires or structures rightfully upon the said right of way; that the poles will be about ten inches in diameter at the base, planted from [99—73] four to eight feet in the ground, according to the length of the poles and in such position upon said right of way as safe and proper construction will permit; the poles to be placed upon that portion of said right of way between a line five feet from the outer edge thereof and a line twenty-five feet from the center of the main track of said railway company, except where the right of way may be less than sixty feet in width or where the location of the main track upon the right of way, or the location of buildings, tracks or other improvements or obstructions upon the right of way, may make it impossible to place poles upon that portion of the right of way above described, in which event, the poles will be placed upon the most practicable remaining portion of the right of way consistent with the safe and proper

construction of said telegraph line; said portion of said right of way to be designated by said railway company, or its lessees, so as not to interfere with the ordinary travel or use of said railroad; that the poles will be set about one hundred sixty-five feet apart, making a total of thirty-two to thirty-five poles to the mile, excepting at sharp angles, where they may be not less than seventy-five feet apart, and around curves where they may be from one hundred seventeen to one hundred thirty-one feet apart; the poles to be equipped with cross-arms about ten feet long at or near the top of the poles, fastened at about the middle of the cross-arms to the poles, and along and upon said cross-arms or poles or upon said cross-arms and poles will be strung a sufficient number of wires to transact such business as will be given to the telegraph company by the United States [100—74] Government and the public; that said line of poles and wires will be constructed of the best material and by the most approved methods of construction and will be so constructed, maintained and operated as not to interfere with the ordinary travel or use of said railroad; that wherever it becomes necessary for said telegraph line to cross said right of way, the said crossing will be made by having its poles at such crossing so erected, and its wires so insulated, and strung so high above said railroad track, as to prevent any injury to, or interference with, the employees or property of the said railway company; that if at any time said railway company, its successors or lessees, shall require for railroad purposes the im-

mediate use of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, the said petitioner, will, at its own expense, remove its line to some other place to be designated by the said railway company adjacent thereto, on said right of way, so as not to interfere with the use of said right of way for railroad purposes; that said telegraph line will not be erected on any embankment cut, or slope of said right of way without the consent of said railway company; and if at any time said railway company, or its lessees, shall require its entire right of way for railroad purposes at any point, the said telegraph company, the petitioner herein, will, at such point or points, remove its line entirely off said right of way.

You are further instructed that this Court has heretofore, as required by the statutes under which this proceeding is authorized, entered its preliminary finding and decree that the aforesaid use for which the [101—75] designated portion of said right of way is sought to be appropriated, is really a public use, and that the public interest requires the prosecution of said enterprise, and that the land sought to be appropriated herein is required and necessary for the purposes of construction, maintenance and operation of said telegraph line; so that the only question for the determination of the jury herein is the amount of damages to be awarded the defendant for the right and easement to construct, reconstruct, maintain and operate its said telegraph line over and upon the aforesaid right of way of the defendant railway company, in the manner and

upon the terms and conditions hereinbefore described and set forth.

You are further instructed that the petitioner, Postal Telegraph-Cable Company of Washington, will, by the decree to be entered by this Court, be bound by the descriptions, terms, conditions and stipulations hereinbefore set forth in these instructions, all of which it will be your duty to take into consideration in determining the said question of damages and arriving at your verdict herein.

In this proceeding, the land along and over which the petitioner seeks to acquire the right and privilege of constructing and maintaining its telegraph line, is owned and held by the defendant company as a right of way for its railway and is therefore already devoted to a public use. The law of this State, however, permits a telegraph company, in such a proceeding as this, to acquire such an easement over the right of way of a railway company, provided that such appropriation does not interfere with the operation of such railway, [102—76] and provided, also, that just compensation be first paid to the defendant company. The right of the petitioner to appropriate the easement sought for its telegraph line upon the right of way of the defendant railway company, as you have heretofore been told, has been determined by the Court; it is for you, however, to determine from the evidence in this case under the instructions given you by the Court, the amount of compensation to be paid therefor to the defendant.

You are instructed that the law requires a railway

company to use reasonable diligence in keeping its right of way cleared from inflammable material, and that where it fails to do so and damage results therefrom, the railway company is liable; and if you should find from the evidence that it is necessary or desirable for the railway company, in order to prevent the setting out and spreading of fires in the operation of its trains, or for any other necessary or appropriate railway use or purpose, to clear and burn the brush, weeds or grass from time to time which may grow upon its right of way, the expense thereof would not be chargeable to the petitioner herein in this proceeding; provided, however, that if you find from the evidence that the necessary expense thereof would in any material or substantial degree be increased by reason of the construction and maintenance of the proposed telegraph line upon said right of way, such additional expense, if any, may be considered by you in arriving at your verdict. In considering that question, however, you are instructed that you are not to consider mere fancied or imaginary difficulties, obstructions or obstacles, but only such [103—77] as are substantial and appreciable.

You are further instructed that if upon careful consideration of all the evidence in this case and of the stipulations made by the telegraph company, the petitioner herein, you find that no material or substantial damage will be suffered by the railroad company in its enjoyment and use of its right of way for railroad purposes, by reason of the appropriation by the petitioner of the right of way for its

telegraph line in the manner and upon the terms and conditions set forth in its petition, as heretofore explained to you, then it will be your duty to return a verdict for the defendant for nominal damages only. But by this instruction the Court does not intend to intimate to you in any manner any view which it may entertain as to the amount which you should award the defendant herein.

You are further instructed that there is nothing in the final decree to be entered herein that imposes any responsibilities upon the petitioner, the Postal Telegraph-Cable Company, with reference to the maintenance of any part of the right of way of the defendant, but that as far as the public is concerned, the same liability is imposed upon the defendant, to care for, clear and protect the same as if the petitioner did not occupy any part thereof.

You are further instructed that under the petition in this case the railway company will have no right to use either the poles or wires of the telegraph company along its right of way without making compensation to the telegraph company therefor.

You are not concerned with the question of the [104—78] necessity for the occupancy by the petitioner with its telegraph line of the right of way of the defendant, as the public necessity therefor was for the determination by the Court and has heretofore been determined in favor of the petitioner. The question for your consideration is the amount of compensation in money to be awarded to the defendant by reason of taking and injuriously affecting of the right of way of the defendant, and

this should be determined irrespective of any benefit from any improvement proposed by the petitioner. As a railroad right of way can only be used for railroad purposes, it has no market value as land, and when a telegraph company seeks to condemn an easement for its lines, the just compensation must be arrived at by considering how much the use of the right of way for railroad purposes is diminished in value by the presence of the telegraph line. That is, the measure of damages is the diminution in value of the right of way for railroad purposes caused by the construction, maintenance and operation of the telegraph line, and in determining this question you should take into consideration all the stipulations contained in the petition pertaining to the manner in which the petitioner will exercise the easement in question, the substance of which petition and the stipulations therein contained has already been read to you.

While the just compensation which it is your duty to award must be arrived at by considering how much the use of the defendant's right of way for railway purposes is diminished in value by the presence of the telegraph line of the petitioner, to be constructed pursuant to the stipulations contained in the petition, [105—79] you are instructed that in arriving at such amount you are not to award anything for remote contingent or speculative consequences.

The petition in effect avers that the petitioner desired and preferred to secure by contract the perpetual right and privilege of constructing, main-

taining and operating its telegraph line along the right of way of the defendant company, and that it has heretofore made earnest and *bona fide* efforts to agree with the railway company for such right, and the compensation to be paid therefor, and that the railway company has refused to give its consent to the petitioner for such right and privilege, and has failed and refused to agree on the compensation to be paid therefor. You are instructed that these allegations are wholly immaterial, and if you find that any evidence was offered in support thereof, you should wholly disregard the same. In a proceeding of this character, the law does not make it a condition precedent for the petitioner to allege and prove that it undertook to agree or failed to agree with the defendant, and if any such endeavor was made, it is wholly immaterial, and it is equally immaterial whether the railway company did or did not refuse to give such consent to the petitioner, or whether the railway company did or did not fail to agree on the compensation to be paid therefor.

The eighth paragraph of the petition among other things avers, "and petitioner avers that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars." This allegation [106—80] is not to be construed by you for or against either party in this cause, its effect being purely for the Court as one of the elements in determining the jurisdiction of this court. In other words, it is not to be construed by you as an admission on the part of the petitioner that the award to be made by you should equal or

exceed the sum, nor should it be construed by you as any inference that the defendant is not entitled to a greater or less sum than three thousand dollars, exclusive of interest and costs.

At the conclusion of the opening statement of the attorney for the petitioner, the defendant made a motion to dismiss this cause for want of jurisdiction, which motion was denied. Again, at the conclusion of the petitioner's testimony a similar motion was made, and again denied. You are instructed that you are not to consider either of these motions or either of the rulings thereon in any manner. They involved purely jurisdictional questions solely addressed to the Court, and in which you are in no manner concerned, and you are not to consider the same in any manner, or the ruling of the Court thereon, as expressive of any opinion the Court may entertain upon the question submitted to you for your consideration.

Harmonize the testimony of all the witnesses who have testified before you, and if this can be done in theory consistent with the truth, you must do so. But if you find any witness has willfully testified falsely concerning any material matter or fact in this case, you have the right to disregard his entire testimony except in so far as you may find it corroborated by other credible [107—81] witnesses and circumstances detailed and developed upon the trial.

While you are the sole and exclusive judges of the amount, under the evidence, to be awarded herein, you are instructed that the law of this case you must

take from the Court. You will disregard anything counsel may have said to you in their argument on the facts in this case, or on any matter addressed to the Court, except in so far as their statements may be sustained by or properly inferable from the evidence in the case. In determining the weight or credit you desire to attach to the testimony of any witness, you should apply the same tests as you would do to any person in the ordinary affairs in life whose truth or falsity is to be considered by you.

You are the sole and exclusive judges of the credibility of the witnesses who have testified before you. In determining the weight or credit you desire to attach to the testimony of any witness, you will have the right to take into consideration, and it is your duty to do so, the demeanor of the witnesses upon the witness-stand, their opportunity of knowing about the things concerning which they testify, their interest or lack of interest in this case, the reasonableness of the stories of the several witnesses who have testified before you, their demeanor and manner of testifying, and from all these determine where the truth in the case lies.

You will consider this case in a dispassionate manner and without sympathy or prejudice for one side or the other.

You will take with you to the jury-room the petition and order adjudicating necessity herein, the [108—82] latter for the purpose of determining therefrom the description of the easement sought to be condemned herein. You will not regard either

as evidence in the cause further than as you have otherwise been instructed you should, in determining the measure of compensation to be awarded, take into consideration all the stipulations contained in the petition pertaining to the manner in which the petitioner will exercise the easement in question. These stipulations are binding upon the petitioner. The exhibits which have been admitted by the Court will also be sent to the jury-room, and these you should consider in connection with the evidence in the case.

You can return but one form of verdict in this cause, which form is as follows: Omitting the title of the court and cause contained in the verdict—"We, the jury duly empaneled in the above-entitled cause, do find that the compensation to be paid in money, irrespective of any benefit from the proposed telegraph line of the petitioner to the above-named defendant, Northern Pacific Railway Company and all persons interested, whether as tenants, encumbrancers, or otherwise, for the taking and injuriously affecting the lands described in the petition and order adjudicating necessity, is the sum of _____ dollars. _____, Foreman."

It will require all of your members to agree upon a verdict in this case, and when you have agreed upon the verdict you will insert the amount which you find should be awarded, in the blank space provided therefor in the foregoing form of verdict, and you will have your foreman sign it, and you will then report to [109—83] the Court. Upon your retirement you will appoint one of your number

foreman. You may now retire, gentlemen of the jury.

Upon the close of the instructions the jury retired to deliberate upon its verdict. Whereupon the petitioner in open court took the following exceptions, which were allowed by the Court:

[Petitioner's Exceptions to Instructions Given and Refused.]

The petitioner excepts to the refusal of the Court to give instruction No. 5, requested by the petitioner, and which requested instruction reads as follows:

As I have already indicated, the right of way of the railway company is owned and held by it solely for railroad purposes. It cannot sell, transfer, encumber or use it except as necessity and convenience may demand for the proper operation of its road. It can, therefore, have no market value because it cannot be placed upon the market, either at public or private sale. In considering the question of compensation to be awarded to the defendant herein, you are therefore instructed that you are not to consider any evidence that may have been introduced or any knowledge possessed by individual members of the jury, bearing upon the market value of the right of way, or any portion thereof, or of lands adjacent thereto; for in this proceeding you are called upon to consider only the uses to which this right of way is or will be devoted by the railway company on the one hand, and the telegraph company on the other, and to determine to what extent,

if any, the use of said right of way by the railway company for railroad purposes will be diminished or damaged by the use which the telegraph company, the petitioner herein, seeks to acquire in this proceeding for the maintenance and operation of its telegraph line.

The petitioner excepts to the refusal of the Court to give the first paragraph of the sixth instruction requested by the petitioner, and which paragraph of said requested instruction reads as follows:

You are further instructed that the statutes of the State of Washington do not impose any express duty upon the defendant railway [110—84] company to cut or burn the brush growing on its right of way, nor to keep the same free from grass, weeds, brush or trees; neither does it impose any such express duty upon the telegraph company. If, however, the defendant railway company does clear its right of way of timber, slashings, choppings, and brush, then it is made its duty under the laws of this State, as rapidly as the clearing or cutting progresses and the weather conditions permit, or at such times as the forester or any of his assistants, or any fire warden may direct, to obtain a permit and to pile and burn the same on such right of way.

The petitioner excepts to the refusal of the Court to give petitioner's requested instruction No. 7, which requested instruction reads as follows:

You are further instructed that if you believe from the evidence that the clearing of brush and other undergrowth immediately surrounding the

poles of the telegraph company would require additional time and expense, then the defendant railway company will owe no duty to the telegraph company to cut or remove such brush and undergrowth, and it need not incur such additional expense unless you believe from the evidence that the cutting of such brush or undergrowth immediately around said telegraph poles would be necessary for the safe and proper operation of defendant's railway trains and business or to prevent the spread of fires from the said railway across its right of way to adjoining land.

The petitioner excepts to the refusal of the Court to give petitioner's requested instruction No. 8, which requested instruction reads as follows:

In other words, gentlemen of the jury, the Court instructs you that the measure of damages in this case would be the amount, if any, which the value of the use of the right of way of the railroad company for railroad purposes is diminished by the appropriation of the easement on the same for the purpose of erecting and maintaining the telegraph line of the petitioner, in the manner and upon the conditions hereinbefore described. The evidence introduced in this case by the respective parties, the Court has permitted for the purpose of establishing or throwing light upon this question, and you are to consider such evidence solely for that purpose.

The petitioner excepts to the refusal of the Court to give petitioner's requested instruction No. 9, [111—85] which requested instruction reads as follows:

It will be your duty to ascertain from the evidence in this case what will be just compensation to the defendant company for the actual damages, if any, in the use of its right of way for railroad purposes; which may be occasioned by the appropriation by the petitioner of its proposed easement for its telegraph line; in determining this question you are instructed that nothing should be allowed for speculative damages or for such remote or inappreciable damages as the imagination may conjure up.

You are likewise instructed that you must not consider any advantages or benefits which may accrue to the telegraph company from its use of the railroad's right of way, in the assessment of damages. The railroad company can only claim compensation for such damages as will actually result to it in the use of its right of way for railroad purposes, by reason of the construction and maintenance of the telegraph line.

The petitioner excepts to the refusal of the Court to give petitioner's requested instruction No. 10, which requested instruction reads as follows:

You are further instructed that in determining the question of defendant's damages herein, it will be your duty to take into consideration the nature and extent of the easement which the petitioner, by the terms of its petition filed herein, seeks to acquire, and likewise the stipulations by which it has proposed to bind itself herein. These descriptions and stipulations will, by the decree which will be entered herein by the Court, bind

the petitioner at all times hereafter and will determine and limit the rights which it acquires by this proceeding. Among other things, the petitioner binds itself that if at any time the defendant railway company, or its successors in interest, shall require for railroad purposes the immediate use of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, it will, at its own expense, remove its line to some other place to be designated by the railway company, adjacent thereto on said right of way, so as not to interfere with the use of said right of way for railroad purposes. It likewise binds itself that its telegraph line will not be erected on any bank or slope of said right of way without the consent of the railway company; and also, that if at any time, said railway company [112—86] shall require its entire right of way for railroad purposes at any point, the petitioner will, at such point or points, remove its line entirely off the right of way.

The petitioner excepts to the modification by the Court of instruction No. 11, as requested by the petitioner, and to the giving of the instruction as so modified by the Court. Said instruction No. 11 was as follows:

You are further instructed that if upon careful consideration of all the evidence in this case and of the stipulations made by the telegraph company, the petitioner herein, you find that no material or substantial damage will be suffered by the railroad company in its enjoyment and use

of its right of way for railroad purposes, by reason of the appropriation by the petitioner of the right of way for its telegraph line in the manner and upon the terms and conditions set forth in its petition, as heretofore explained to you, then it will be your duty to return a verdict for the defendant for nominal damages only.

The Court modified said instruction by adding the following sentence:

But by this instruction the Court does not intend to intimate to you in any manner any view which it may entertain as to the amount which you should award the defendant herein.

The petitioner excepts to the giving by the Court of instruction No. 4, requested by the defendant, which instruction was as follows:

You are further instructed that there is nothing in the final decree to be entered herein that imposes any responsibilities upon the petitioner, the Postal Telegraph-Cable Company, with reference to the maintenance of any part of the right of way of the defendant, but that as far as the public is concerned, the same liability is imposed upon the defendant, to care for, clear and protect the same as if the petitioner did not occupy any part thereof. [113—87]

The petitioner excepts to the giving by the Court of instruction No. 10, requested by the defendant, which instruction was as follows:

You are further instructed that under the petition in this case the railway company will have no right to use either the poles or wires of the

telegraph company along its right of way without making compensation to the telegraph company therefor.

Order Settling Bill of Exceptions.

The foregoing entitled cause coming on regularly for hearing before the Court on this 3d day of March, 1913, the time duly designated by the Court for settling and certifying the bill of exceptions therein, the petitioner and the defendant now appearing by their respective attorneys of record herein, and the said petitioner having within the time extended by stipulation and order of the Court herein for that purpose, duly proposed the foregoing as a bill of exceptions in said action, and the parties now agreeing to the settlement of the foregoing as the bill of exceptions in this action,—

Now, therefore, it is by the Court and the Judge of said court presiding at the trial of said cause, ORDERED and CERTIFIED that the foregoing be and the same hereby is settled as the true bill of exceptions in said cause, and that said bill of exceptions, together with the exhibits therein referred to and thereto [114—88] attached includes all the material facts and evidence herein, and the same is hereby approved, allowed and made a part of the record herein, and the same being so settled and certified, it is hereby ordered to be filed herein by the clerk.

CLINTON W. HOWARD,

Judge.

Indorsed: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington. Mar.

3, 1913. Frank L. Crosby, Clerk. By E. M. L.,
Deputy. [115—89]

[Plaintiff's Exhibit No. 1.]

POSTOFFICE DEPARTMENT.

WASHINGTON.

November 6, 1912.

I, Charles P. Grandfield, Acting Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance filed August 29, 1904, in this Department.

In testimony whereof I have hereto set my hand and caused the seal of the Postoffice Department to be affixed, at the City of Washington, the day and year above written.

[Seal]

C. P. GRANDFIELD,
Acting Postmaster General.

G. G. S.

Case No. ——. Plaintiff's Exhibit 1. United States District Court, Western Dist. of Washington, P. T. & C. Co. vs. N. P. R. R. Co. Filed 11/20/1912.

FORM 23.

TO ALL WHOM IT MAY CONCERN:

Be it known, that the Postal Telegraph-Cable Company of Washington a corporate body organized under the laws of Washington, through its duly authorized officers, whose signatures are hereto attached, does hereby accept, without reservation, all of the restrictions and obligations of the Act of Congress approved July 24, 1866, entitled "An Act to aid in the construction of telegraph lines and to

secure to the Government the use of the same for postal, military, and other purposes." And the said company does hereby agree [116] that telegrams between the several Departments of the Government and their officers and agents shall at all times have priority over all other business in their transmission over the lines of said company, and that the charges for such telegrams shall not exceed the rates annually fixed by the Postmaster General.

This declaration of acceptance is made in order that said Postal Telegraph-Cable Company of Washington may be entitled to the rights and privileges granted by the Act of Congress aforesaid.

Done at New York City this 22d day of August, 1904.

POSTAL TELEGRAPH-CABLE COM-
PANY OF WASHINGTON.

By WM. H. BAKER, President.

Attest: CHAS. P. BRUCH, Secretary.

Postal Telegraph-Cable Company of Washington
Incorporated

1904

Washington.

248

ACCEPTANCE BY THE POSTAL TELE-
GRAPH-CABLE COMPANY OF WASHING-
TON

Of the obligations and restrictions of the Act of Con-
gress approved July 24, 1866.

Date: Aug. 22, 1904.

Received Aug. 29, 1904.

Address of Company:
CHAS. P. BRUCH, Secretary,
253 Broadway,
New York City.

[Indorsed]: Case No. Plaintiff's Exhibit 1.
United States District Court, Western Dist. of
Washington. P. T. & C. Co. vs. N. P. R. R. Co.
Filed 11/20/1912. [117]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,
Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Defendant in Error.

Assignment of Errors.

Comes now Postal Telegraph-Cable Company of
Washington, a corporation, plaintiff in error in the
above numbered and entitled cause, and in connec-
tion with its petition for a writ of error in this cause
assigns the following errors which plaintiff in error
averts occurred on the trial thereof, and upon which
it relies to reverse the judgment entered herein as
appears of record:

I.

Horace Middaugh, witness on behalf of plaintiff in

error, having testified that he had been engaged in the railroad business about twenty-three years; that he was superintendent of bridges, buildings and track, and had charge of the right of way between Seattle and Sumas, being the right of way involved in this proceeding, between the years 1889 and 1899, inclusive, and an issue in said cause being the damage, if any, to the use and operation of said right of way by the defendant in error railway company for railway [118] purposes by reason of the construction, maintenance and operation of the telegraph line by the plaintiff in error, as proposed in its petition herein, the following question was propounded to said witness, to wit: "Q. Mr. Midgah, from your knowledge of the right of way on this line from Seattle to Sumas, what would you say as to whether the construction and maintenance of a telegraph line would cause any injury or damage to the use and operation of the right of way of the railroad company for railroad purposes; if so, what?" To which question defendant in error objected on the ground that the witness had not shown himself to be qualified.

And plaintiff in error avers that the Court erred in sustaining said objection and refusing to permit the witness to testify in answer to said question, to which ruling of the Court the plaintiff in error excepted and its exception was allowed.

II.

The Court erred in permitting J. E. Craver, witness on behalf of defendant in error, to testify of particular instances of poles falling upon the rail-

way track because they were placed too close thereto, in answer to the following question propounded by defendant in error, to wit: "Q. Mr. Craver, I wish you would state to the jury from your experience as an operating man, what, if any, added expense or embarrassment there is under which this line would be operated by reason of the danger of the falling of poles and the like—poles to be constructed as provided under this petition." Which question was objected to as incompetent, irrelevant and immaterial, and as remote, contingent and uncertain. The objection was overruled and the exception of plaintiff in error duly taken and allowed. [119]

III.

The Court erred in permitting the said witness Craver to testify that it cost defendant in error additional expense in protecting certain existing telegraph poles on right of way of defendant in error in doing certain work in which the railway company was then engaged in answer to the following question propounded by the defendant in error, to wit: "Q. Mr. Craver, I wish you would state to the jury, in doing that work that is being done around the Pilchuck where you are cutting out the grades and making a new fill, whether or not in doing that work, irrespective of the fact of obligations similar to those contained in this petition, if there is any added expense in making your fills around those poles or making your cuts under the poles." To which plaintiff in error objected as irrelevant, immaterial and incompetent, which objection was over-

ruled and the exception of plaintiff in error thereto duly allowed.

IV.

The defendant in error, having introduced in evidence testimony tending to show special damage on account of the construction, maintenance and operation of the proposed telegraph line of the plaintiff in error in clearing and burning the brush on its right of way, in that additional expense would be involved in cutting the brush around the telegraph poles and in piling said brush and burning the same so as to avoid injury or damage to the proposed telegraph poles and wires of the plaintiff in error, the said plaintiff in error sought to prove in rebuttal, by one E. Colburn, civil engineer, a competent and experienced witness acquainted with said right of way, what was the character of the land embraced [120] therein with respect to its susceptibility for growing weeds, grass and brush, and what, if any, would be the additional labor or time required in the periodical clearing of the right of way of brush by reason of the presence of the proposed telegraph poles, and sought to show by said witness that no material additional labor, time or expense would be incurred by the defendant in error in clearing and burning the brush in said right of way by reason of the presence of the proposed telegraph line; to all of which testimony the defendant in error objected on the ground that it was not rebuttal, and the Court erred in sustaining said objection, to which rulings of the Court the defendant in error excepted and its exception was allowed.

V.

The Court likewise erred in refusing to permit the witness J. J. Lynch, a competent and experienced person, to testify in rebuttal that the cutting of brush on right of way of defendant in error would require no additional time or expense because of the presence of the proposed telegraph poles thereon, and erred in sustaining the objection to said testimony on the ground that the same was not rebuttal, to which ruling of the Court defendant in error excepted and its exception was allowed.

VI.

The Court erred in refusing to give instruction No. 5 requested by the plaintiff in error, which requested instruction reads as follows:

“As I have already indicated, the right of way of the railway company is owned and held by it solely for railroad purposes. It cannot sell, transfer, encumber or use it except as necessity and convenience may demand for the [121] proper operation of its road. It can, therefore, have no market value because it cannot be placed upon the market, either at public or private sale. In considering the question of compensation to be awarded to the defendant herein, you are therefore instructed that you are not to consider any evidence that may have been introduced or any knowledge possessed by individual members of the jury bearing upon the market value of the right of way, or any portion thereof, or of lands adjacent thereto; for in this proceeding you are called upon to consider only the uses to which

this right of way is or will be devoted by the railway company on the one hand, and the telegraph company on the other, and to determine to what extent, if any, the use of said right of way by the railway company for railroad purposes will be diminished or damaged by the use which the telegraph company, the petitioner herein, seeks to acquire in this proceeding for the maintenance and operation of its telegraph line.”

VII.

Defendant in error having introduced testimony tending to show that in cutting the brush on the right of way it could not be burned as it fell because of the presence of the telegraph poles and wires, but that additional labor and expense would be required in order to pile the brush so as to avoid injury and damage to said telegraph poles and wires in burning said brush, the court erred in refusing to give the first paragraph of the 6th instruction requested by the plaintiff in error, which reads as follows:

“You are further instructed that the statutes of the State of Washington do not impose any express duty upon the defendant railway company to cut or burn the brush growing on its right of way, nor to keep the same free from grass, weeds, brush or trees; neither does it impose any such express duty upon the telegraph company. If, however, the defendant railway company does clear its right of way of timber, slashings, choppings, and brush, then it is made its duty under the laws of this state, as rapidly as the clearing or cutting progresses and the weather conditions

permit or at such times as the forester or any of his assistants, or any fire warden may direct, to obtain a permit and to pile and burn the same on such right of way." [122]

VIII.

The Court erred in refusing to give instruction No. 7 requested by the plaintiff in error, which requested instruction reads as follows:

"You are further instructed that if you believe from the evidence that the clearing of brush and other undergrowth immediately surrounding the poles of the telegraph company would require additional time and expense, then the defendant railway company will owe no duty to the telegraph company to cut or remove such brush and undergrowth, and it need not incur such additional expense unless you believe from the evidence that the cutting of such brush or undergrowth immediately around said telegraph poles would be necessary for the safe and proper operation of defendant's railway trains and business or to prevent the spread of fires from the said railway across its right of way to adjoining land."

IX.

The Court erred in refusing to give the 9th instruction requested by plaintiff in error, which requested instruction reads as follows:

"It will be your duty to ascertain from the evidence in this case what will be just compensation to the defendant company for the actual damages, if any, in the use of its right of way for railroad purposes, which may be occasioned by the appro-

priation by the petitioner of its proposed easement for its telegraph line; in determining this question you are instructed that nothing should be allowed for speculative damages or for such remote or inappreciable damages as the imagination may conjure up.

You are likewise instructed that you must not consider any advantages or benefits which may accrue to the telegraph company from its use of the railroad's right of way, in the assessment of damages. The railroad company can only claim compensation for such damages as will actually result to it in the use of its right of way for railroad purposes, by reason of the construction and maintenance of the telegraph line." [123]

X.

The Court erred in refusing to give the 10th instruction requested by plaintiff in error, which instruction reads as follows:

"You are further instructed that in determining the question of defendant's damages herein, it will be your duty to take into consideration the nature and extent of the easement which the petitioner, by the terms of its petition filed herein, seeks to acquire, and likewise the stipulations by which it has proposed to bind itself herein. These descriptions and stipulations will by the decree which will be entered herein by the Court, bind the petitioner at all times hereafter and will determine and limit the rights which it acquires by this proceeding. Among other things, the petitioner binds itself that if at any time the defendant rail-

way company, or its successors in interest, shall require for railroad purposes the immediate use of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, it will, at its own expense, remove its line to some other place to be designated by the railway company, adjacent thereto on said right of way, so as not to interfere with the use of said right of way for railroad purposes. It likewise binds itself that its telegraph line will not be erected on any bank or slope of said right of way without the consent of the railway company; and also, that if at any time, said railway company shall require its entire right of way for railroad purposes at any point, the petitioner will, at such point or points, remove its line entirely off the right of way."

XI.

The Court erred in modifying the 11th instruction requested by the plaintiff in error and in giving said modification as a part of its instruction to the jury. Said instruction No. 11 was as follows:

"You are further instructed that if upon careful consideration of all the evidence in this case and of the stipulations made by the telegraph company, the petitioner herein, you find that no material or substantial damage will be suffered by the railroad company in its [124] enjoyment and use of its right of way for railroad purposes, by reason of the appropriation by the petitioner of the right of way for its telegraph line in the manner and upon the terms and condi-

tions set forth in its petition, as heretofore explained to you, then it will be your duty to return a verdict for the defendant for nominal damages only."

The Court modified said instruction by adding the following sentence:

"But by this instruction the Court does not intend to intimate to you in any manner any view which it may entertain as to the amount which you should award the defendant herein."

XII.

The Court erred in giving the 4th instruction requested by the defendant in error, which instruction is as follows:

"You are further instructed that there is nothing in the final decree to be entered herein that imposes any responsibilities upon the petitioner, the Postal Telegraph-Cable Company, with reference to the maintenance of any part of the right of way of the defendant, but that as far as the public is concerned, the same liability is imposed upon the defendant, to care for, clear and protect the same as if the petitioner did not occupy any part thereof."

XIII.

The Court erred in giving the 10th instruction requested by the defendant in error, which instruction is as follows:

"You are further instructed that under the petition in this case the railway company will have no right to use either the poles or wires of the telegraph company along its right of way

without making compensation to the telegraph company therefor."

WHEREFORE, plaintiff in error prays that the judgment of said court be reversed and said cause be remanded for trial.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Plaintiff in Error. [125]

Copy of within Assignment of Errors received and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,
Atty. for Defendant.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [126]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,
Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Petition for Order Allowing Writ of Error.

The said petitioner, Postal Telegraph-Cable Company of Washington, a corporation, feeling itself

aggrieved by the judgment for damages entered in said cause on the 3d day of March, 1913, in which judgment, and the proceedings leading up to the same, certain errors were committed to the prejudice of said petitioner, which more fully appear from the assignment of errors which is filed herewith, comes now and prays said Court for an order allowing the said petitioner to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made fixing the amount of security which the said petitioner shall give upon said writ of error. And further prays that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and your petitioner will ever pray.

Dated this 21st day of March, A. D. 1913.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Petitioner, [127]

Copy of within Petition for Order Allowing Writ of Error received and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,
Atty. for Defendant.

Indorsed: Petition for Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [128]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

**Order Granting Writ of Error and Fixing Amount
of Bond.**

This cause coming on this day to be heard in the courtroom of said court in the city of Seattle, Washington, upon the petition of the petitioner, Postal Telegraph-Cable Company of Washington, a corporation, herein filed, praying the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors, also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

The Court having duly considered the same does hereby allow the said writ of error prayed for, and

it is ORDERED that the amount of the cost bond to be given by said petitioner on such writ of error be and the same hereby is fixed at the sum of One Thousand Dollars.

Done in open court this 21st day of March, 1913.

EDWARD E. CUSHMAN,

Judge. [129]

Copy of within Order Granting Writ of Error and Fixing Amount of Bond received, and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,

Atty. for Defendant.

Indorsed: Order Granting Writ of Error and Fixing Amount of Bond. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.
[130]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

Cost Bond.

KNOW ALL MEN BY THESE PRESENTS:

That we, Postal Telegraph-Cable Company of Washington, a corporation, the above-named petitioner, as principal, and New England Casualty Company, a body corporate, duly incorporated under the laws of the State of Massachusetts and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the Northern Pacific Railway Company, a corporation, the above-named defendant, in the sum of One Thousand Dollars, to be paid to said defendant, its successors and assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 21st day of March, A. D. 1913.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT

WHEREAS in the above court and cause judgment for damages was rendered and entered on the 3rd day of March, 1913; and

WHEREAS, the said petitioner has obtained from said [131] court a writ of error to reverse the said judgment in said action and a citation directed to the defendant is about to be issued citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California;

NOW, THEREFORE, if the said petitioner, Pos-

tal Telegraph-Cable Company of Washington, a corporation, shall prosecute the said writ of error to effect, and shall answer all costs that may be awarded against it if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

POSTAL TELEGRAPH-CABLE COMPANY OF WASHINGTON,

By J. J. DUNNE, [Seal]

Its Agent.

By HUGHES, McMICKEN, DOVELL & RAMSEY,

Its Attorneys.

NEW ENGLAND CASUALTY COMPANY.

[Seal]

By C. M. SEELEY,

Atty. in Fact.

SEELEY & CO.,

By N. BURSCHER,

General Agent.

The sufficiency of the surety on the foregoing bond approved by me this 21st day of March, A. D. 1913.

EDWARD E. CUSHMAN,

Judge of said Court.

Copy of within Cost Bond received, and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,

Atty. for Defendant. [132]

Indorsed: Cost Bond. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 21, 1913.

Frank L. Crosby, Clerk. By E. M. L., Deputy.
[133]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Writ of Error [Copy].

United States of America,—ss.

The President of the United States of America to
the Judges of the District Court of the United
States, for the Western District of Washington,
Northern Division, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment for damages of the
plea which is in the said District Court before you,
or some of you, between the Postal Telegraph-Cable
Company of Washington, a corporation, petitioner,
and Northern Pacific Railway Company, a corpora-
tion, defendant, a manifest error hath happened, to
the great damage of the said Postal Telegraph-Cable
Company of Washington, a corporation, petitioner,
as is said and appears by the complaint, we being
willing that such error, if any hath been, should be

duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the city [134] of San Francisco, in the State of California, together with this writ, so that you have the same at the said place in the said Circuit Court of Appeals, to be then and there held on the 19th day of April, 1913, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 21st day of March, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal]

FRANK L. CROSBY.

Clerk of said District Court of the United States,
for the Western District of Washington.

The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN.

United States District Judge for the Western District of Washington.

Received copy of the foregoing writ of error

lodged with me for defendant in error this 21st day of March, 1913.

[Seal]

FRANK L. CROSBY,
Clerk of the United States District Court for the
Western District of Washington. [135]

Copy of within Writ of Error received, and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,
Atty. for Defendant in Error.

Indorsed: Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [136]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,
Plaintiff in Error,
vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,
Defendant in Error.

Citation on Writ of Error [Copy].

United States of America,—ss.

To Northern Pacific Railway Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court

of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, on the 19th day of April, 1913, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Postal Telegraph-Cable Company of Washington, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated the 21st day of March, A. D. 1913.

EDWARD E. CUSHMAN,
United States District Judge, for the Western District of Washington. [137]

[Seal] Attest: FRANK L. CROSBY,
Clerk of said United States District Court for the Western District of Washington.

By _____,
Deputy.

Copy of within Citation received, and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,
Atty. for Defendant in Error.

Indorsed: Citation. Filed in the U. S. District Court, Western District of Washington, Mar. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [138]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

Stipulation as to Record.

IT IS HEREBY STIPULATED, between the
parties hereto, that the Clerk of this Court in mak-
ing up his return to the writ of error herein shall
include therein the following:

Petition, filed May 27, 1912.

Summons with return thereon, filed May 28, 1912.

Appearance of defendant, filed June 10, 1912.

Order adjudicating necessity, filed June 17, 1912.

Verdict, filed November 22, 1912.

Cost bill, filed November 25, 1912.

Motion for new trial, filed December 17, 1912.

Order denying motion for new trial, filed February
19, 1913.

Judgment, filed March 3, 1913.

Bill of exceptions, filed March 3, 1913, with pet'r's

Ex. 1.

Assignment of errors, filed March 21, 1913.

Petition for order allowing writ of error, filed March 21, 1913.

Order granting writ of error and fixing amount of bond, filed March 21, 1913. [139]

Cost bond, filed March 21, 1913.

Writ of error, filed March 21, 1913.

Writ of error (copy lodged with Clerk), filed March 21, 1913.

Citation and acceptance of service thereon, filed March 21, 1913.

Stipulation as to record, filed April 3d, 1913.

Which comprise all the papers, exhibits, depositions and other proceedings which are necessary to the hearing of said cause upon such writ of error in the United States Circuit Court of Appeals, and that no other papers or proceedings than those above mentioned need be included by the clerk of said court in making up his return to said writ of error as a part of such record.

Dated: April 1st, 1913.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Petitioner.
C. H. WINDERS,
Attorney for Defendant.

Indorsed: Stipulation as to Record. Filed in the U. S. District Court, Western Dist. of Washington. Apr. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [140]

[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing 140 type-written pages, numbered from 1 to 140, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, exhibits, depositions and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court and that the same constitute the record on return to said Writ of Error

herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for [141] the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828, R. S. U. S., as Amended by Sec. 6, Act of March 2, 1905) for mak- ing transcript of the record for printing purposes, 366 folios at 20c per folio.	\$73.20
Certificate to certified copy of typewritten transcript of record.30
Seal to said certificate.40
	<hr/>
	\$73.90

I hereby certify that the above cost for preparing and certifying record amounting to \$73.90 has been paid to me by Messrs. Hughes, McMicken, Dovell & Ramsey, attorneys for petitioner.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my

hand and affixed the seal of said District Court at Seattle, in said District, this 11th day of April, 1913.

[Seal]

FRANK L. CROSBY,

Clerk.

By Ed. M. Lakin,

Deputy. [142]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Writ of Error [Original].

United States of America,—ss.

The President of the United States of America to
the Judges of the District Court of the United
States, for the Western District of Washing-
ton, Northern Division, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment for damages of the
plea which is in the said District Court before you,
or some of you, between the Postal Telegraph-Cable
Company of Washington, a corporation, petitioner,
and Northern Pacific Railway Company, a corpora-
tion, defendant, a manifest error hath happened, to
the great damage of the said Postal Telegraph-Cable

Company of Washington, a corporation, petitioner, as is said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same [143] to the United States Circuit Court of Appeals for the Ninth Circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place in the said Circuit Court of Appeals, to be then and there held on the 19th day of April, 1913, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 21st day of March, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal]

FRANK L. CROSBY,
Clerk of said District Court of the United States,
for the Western District of Washington.

The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN,
United States District Judge for the Western Dis-
trict of Washington.

Received copy of the foregoing writ of error lodged with me for defendant in error this 21st day of March, 1913.

[Seal]

FRANK L. CROSBY,

Clerk of United States District Court for the Western District of Washington. [144]

Copy of within Writ of Error received, and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,

Atty. for Defendant in Error. [145]

Indorsed: Original. No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Postal Telegraph-Cable Company of Washington, a Corporation, Plaintiff in Error, *vs.* Northern Pacific Railway Company, a Corporation, Defendant in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Citation [on Writ of Error—Original].

United States of America,—ss.

To Northern Pacific Railway Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, State of California, on the 19th day of April, 1913, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Postal Telegraph-Cable Company of Washington, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated the 21st day of March, A. D. 1913.

EDWARD E. CUSHMAN,

United States District Judge, for the Western District of Washington. [146]

[Seal]

Attest: FRANK L. CROSBY,
Clerk of said United States District Court for the Western District of Washington.

By _____,

Deputy. [147]

Copy of within Citation received, and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,

Atty. for Defendant in Error. [148]

Indorsed: Original. No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Postal Telegraph-Cable Company of Washington, a Corporation, Plaintiff in Error, vs. Northern Pacific Railway Company, a Corporation, Defendant in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

Indorsed: No. 2268. United States Circuit Court of Appeals for the Ninth Circuit. Postal Telegraph-Cable Company of Washington, a Corporation, Plaintiff in Error, vs. Northern Pacific Railway Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed April 16, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States Circuit Court of Appeals
 FOR THE NINTH CIRCUIT

No. 2268.

POSTAL TELEGRAPH-CABLE COMPANY OF WASHINGTON, a Corporation,	}	<i>Plaintiff in Error,</i>
--	---	----------------------------

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, <i>Defendant in Error.</i>	}	
---	---	--

Upon Writ of Error to the United States District Court
 for the Western District of Washington,
 Northern Division.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

This is a proceeding instituted under the eminent domain laws of the State of Washington. In order that the statement of the case may be rendered entirely clear and the questions arising upon this writ of error be better understood, we deem it

advisable to first set forth the provisions of the Constitution and statutes of the State of Washington applicable thereto.

Section 19 of Art. XII of the Constitution is as follows:

“Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this state, and said companies shall receive and transmit each other’s messages without delay or discrimination, and all of such companies are hereby declared to be common carriers and subject to legislative control. *Railroad corporations organized or doing business in this state shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights-of-way of such railroads and railroad companies*, and no railroad corporation organized or doing business in this state shall allow any telegraph corporation or company any facilities, privileges, or rates for transportation of men or material or for repairing their lines not allowed to all telegraph companies. The right of eminent domain is hereby extended to all telegraph and telephone companies. The legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section.”

The first Legislature of the State passed a law to give effect to the above provision of the Constitution (Laws of 1890, p. 292). The provisions of this statute are embodied in the following sections of Vol. 2 of Remington & Ballinger's Annotated Codes and Statutes of Washington:

"§ 9300. The right of eminent domain is hereby extended to all telegraph and telephone corporations and companies organized or doing business in the state."

"§ 9302. Every railroad operated in this state, and carrying freight and passengers for hire, or doing business in this state, is and shall be designated a 'post road,' and the corporation or company owning the same shall allow telegraph and telephone companies to construct and maintain telegraph and telephone lines on and along the right of way of such railroad."

"§ 9303. No railroad corporation or company organized or doing business in this state shall allow any telegraph or telephone company, or any individual, any facilities, privileges or rates for transportation of men or material, or for repairing their lines, not allowed to all telegraph and telephone companies and individuals."

"§ 9314. Any telegraph or telephone corporation or company, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary lines of

telegraph or telephone for public traffic along and upon any public road, street, or highway, *along or across the right of way of any railroad corporation, and may erect poles, piers, or abutments for supporting insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the railroad or highway, or interrupt the navigation of the waters: Provided that when the right of way of such corporation has not been acquired by or through any grant or donation from the United States, or this State, any county, city, or town therein, then the right to construct and maintain such lines shall be secured only by the exercise of the right of eminent domain, as provided by law:* Provided further, that where the right of way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone lines can be erected thereon."

"§ 9318. In case of the refusal or neglect of any railroad company or corporation to comply with the provisions of section 9302, said company or corporation shall be liable for damages in the sum of not less than one thousand dollars nor more than five thousand dollars for each offense, and one hundred dollars per day during the continuance thereof."

The statutes of the State providing the mode of exercising the right of eminent domain are, so far as material to a proper understanding of the case, contained in the following sections of Vol. 1 of Remington & Ballinger's Annotated Codes and Statutes of Washington:

§921 provides, in substance, that any corporation authorized by law to appropriate land, etc., may present to the Superior Court of the proper county a petition, describing with reasonable certainty the premises or other property sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by the corporation exercising the right, for the taking or injuriously affecting such lands, premises or other property, or that in case a jury be waived that the compensation be then ascertained and determined by the court.

§922 provides for the giving of notice and the contents thereof. §925 provides that at the time and place appointed for hearing said petition the court, or a judge thereof, shall, if satisfactory proof be furnished that the contemplated use is really a public use, enter an order adjudicating necessity and directing the summoning of a jury to ascertain the compensation to be paid. §926 provides for the hearing before the court and a jury, and that the jury shall ascertain and determine the award or amount of damages to be paid the owner for the

taking or injuriously affecting of the premises for the purpose of the enterprise, irrespective of any benefit from any improvement proposed thereby. It further provides that "upon the trial witnesses may be examined in behalf of either party to the proceedings as in civil actions;" and that upon the verdict of the jury judgment shall be entered for the amount of the damages awarded. And it further provides that in case a jury is waived, the compensation shall be ascertained and determined by the court or a judge thereof; and that the proceedings shall be the same as in trials of an issue of fact by the court. §927 provides that "at the time of rendering judgment for damages, whether upon default or trial, if not paid at the time of rendering such judgment, the court, or judge thereof, shall also enter a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated," etc. §931 provides that either party may appeal from the judgment for damages and that such appeal may bring before the appellate court the propriety and justness of the amount of damages.

The plaintiff in error is engaged in the telegraph business, with connecting telegraph lines throughout the United States of America and Dominion of Canada and with cable connections throughout the world, and owns and operates, among other telegraph lines, a line of telegraph poles and wires along and upon the right of way of the defendant North-

ern Pacific Railway Company from the intersection of Evanston Street in the City of Seattle northward to the international boundary line at the town of Sumas.

This telegraph line was constructed and has been maintained under and by virtue of a written contract entered into by and between the predecessors in interest of the plaintiff in error and of the defendant in error on the 17th of February, 1888; and said contract by its terms expired on the 17th of February, 1913. Before the expiration of said contract the plaintiff in error endeavored to secure by contract the perpetual right and privilege of constructing, reconstructing, maintaining and operating its said telegraph line on, upon, over and across the said right of way of the defendant Railway Company, but said Railway Company refused to give its consent for said right and privilege and refused to agree upon the compensation to be paid therefor. Thereupon, plaintiff in error filed its petition in this cause, on the 27th of May, 1912, in pursuance of the provisions of the foregoing statutes.

After setting out the foregoing matters and the necessary jurisdictional facts, the petition described the right of way of the defendant Railway Company and the general character and location of the telegraph line to be constructed and maintained upon said right of way; and, among other things, the following averments are set forth in this petition:

“Its poles to be erected as near the outer edge of said right of way as circumstances will permit, and in such position as not to interfere with the operation or safety of trains or with the use of the right of way by said railway company or its lessees, for its or their own purposes; * * * that said line is now and will at all times hereafter be constructed and reconstructed of the best material and by the most approved methods of construction, and will consist of a single line of poles not less than twenty (20) nor more than thirty (30) feet in length, including length underground, except at highways or where obstructions exist, where the poles will be of such a height as may be required by statute, or necessary because of physical conditions existing, or to protect other wires or structures rightfully upon the said right of way; that the poles will be about ten (10) inches in diameter at the base, planted from four (4) to eight (8) feet in the ground, according to the length of the poles, and in such positions upon said right of way as safe and proper construction permit; the poles to be placed upon that portion of said right of way between a line five feet from the outer edge thereof and a line twenty-five feet from the center of the main track, except where the right of way may be less than sixty feet in width, or where the location of the main track upon the

right of way, or the location of buildings, tracks or other improvements or obstructions upon the right of way may make it impossible to place the poles upon that portion of the right of way above described, in which event the poles will be placed upon the most practicable remaining portion of the right of way consistent with the safe and proper construction of said telegraph line, such portion of said right of way to be designated by said railway company or its lessees, so as not to interfere with the ordinary travel or use of said railroad; that the poles will be set about one hundred and sixty-five (165) feet apart, making a total of thirty-two (32) to thirty-five (35) poles to the mile, excepting at sharp angles, where there may be not less than seventy-five (75) feet apart, and around curves, where they may be from one hundred and seventeen (117) to one hundred and thirty-one (131) feet apart; the poles to be equipped with cross-arms about ten feet long, at or near the top of the poles, fastened at about the middle of the cross-arms to the poles, and along and upon said cross-arms or poles, or upon said cross-arms and poles, will be strung a sufficient number of wires to transact such business as will be given to the telegraph company by the United States Government and the public. That said line of poles and wires will be so constructed, maintained

and operated as not to interfere with the ordinary travel or use of said railroad.”

Said petition also contains the following express stipulations:

“This petitioner further avers that the only lands that will be actually taken or occupied by it by virtue of this proceeding will be about one square foot for each pole; that the space between the poles and under the wires can be used by said railway company or its lessees for all purposes for which it has heretofore been used; that wherever it becomes necessary for said telegraph line to cross said right of way the said crossing will be made by having its poles at such crossing so erected and its wires so insulated and strung so high above said railroad track as to prevent any injury to or interference with the employees or property of the said railway company; and this petitioner further stipulates that its said telegraph line will not interfere with any other telegraph or telephone line now rightfully upon said right of way. That if at any time the said railway company, its successors or lessees, shall require for railroad purposes the immediate use of any of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, this petitioner will, at its own expense, remove its line to some other place, to be desig-

nated by said railway company, adjacent thereto, on such right of way, so as not to interfere with the use of said right of way for railroad purposes. That said telegraph line will not be erected on any embankment or slope or any cut of said right of way, without the consent of said railway company; and if at any time said railway company or its lessees shall require its entire right of way for railroad purposes at any point, the telegraph company will at such point or points remove its line entirely off said right of way."

On the 17th of June, 1912, upon due notice and after appearance by defendant in error, the Court entered its order adjudicating necessity, and ordering that a jury be impaneled to ascertain and determine the compensation to be made in money, as provided by the above statutes.

No answer or other pleading is expressly required on the part of the defendant under the eminent domain statutes of the State of Washington, and none was filed in this cause.

On the 19th of November, 1912, the proceeding came on for hearing before the Court and a jury duly impaneled to try said cause.

J. G. Blake, General Superintendent of the Pacific Division of the Postal Telegraph-Cable Company, testified on behalf of the plaintiff in error, describing the right of way of the Railway Company, and also the proposed location and con-

struction of the telegraph line of the plaintiff in error on said right of way. He further testified, after qualifying so to do, that the damage or diminution in the value of the use of the right of way by the Railway Company for railroad purposes occasioned by the appropriation of the right to construct and maintain the telegraph line, in the manner and upon the stipulations as set forth in the petition of the plaintiff in error, would be merely nominal.

J. A. Forehand, the Superintendent of the plaintiff in error, testified to the same effect; as did also J. J. Lynch, Superintendent of Construction for the Pacific Division of the Postal Telegraph system.

The plaintiff in error also produced and offered the testimony of Horace Middaugh, who had been engaged in the railroad business about twenty-three years, and who had been superintendent of bridges, buildings and track on the right of way in question from 1889 to 1899, but since that time had not been engaged in the railroad business. He was permitted to testify generally concerning the effect of the presence of a telegraph line on the right of way of a railway company, and that there would be no damage or diminution in the value of the use of a railroad right of way for railroad purposes caused by the construction and maintenance of a telegraph line in the manner proposed by the petition in this proceeding; but he was not permitted to answer the following question:

“Q. Mr. Middaugh, from your knowledge of the right of way on this line from Seattle to Sumas, what would you say as to whether the construction and maintenance of a telegraph line would cause any injury or damage to the use and operation of the right of way of the railroad company for railroad purposes—if so, what?” (Record p. 46.)

The defendant in error produced and examined a number of witnesses, none of whom was asked and none of whom testified as to the extent or amount of the depreciation in value, if any, of the use of the right of way in question for railroad purposes by reason of the construction and maintenance of the telegraph line of plaintiff in error in the manner and under the stipulations set forth in its petition.

L. M. Perkins, Engineer of Maintenance, was permitted to testify that the proposed telegraph line would cause an added annual expense in the maintenance of the right of way, saying:

“The added expense has not been made an exact matter of record by bookkeeping, but I would estimate from my general knowledge of the line in question and of the nature of it, that the specific and general items that add to the cost of the maintenance on that line by reason of the presence of a pole line would make an annual amount of about fifteen dollars per mile.
* * * I am taking into consideration the added

cost of clearing the right of way from brush; the added cost by reason of the particular items of clearing and pulling the brush and inflammable material away from poles to protect them from destruction by fire; the added cost by reason of the presence of poles between and adjacent to tracks, in the way of acting as obstructions to the handling of ties and tie renewals; the added cost by reason of the protection and care that is needed in the burning of old ties, and needed in order to protect the poles from fire and to protect the wire lines from damage; the added cost by reason of delays that occur in connection with construction, in waiting for poles to be moved, and the actual loss of the use of a certain amount of team track capacity by reason of poles being located beside team tracks and thereby preventing the use of a certain part of the team track," etc. (Record, pp. 63, 64.)

F. M. Smith, roadmaster of defendant in error, testified upon the same question as follows:

"It would increase the cost of maintenance in several ways. Places where our right of way is narrow, it would doubtless increase the cost of burning the old ties; that is, moving them to a place where sufficient clearance could be obtained from the wires so that we could burn them without injuring the wires and also in un-

loading our ties or piling them up; and, in places where the brush is rather heavy, in the cutting of the brush, we would have to pile the brush back from the poles and from under the wires so that when the slashing was burned it would not destroy the poles and the wires, and we have at various times when we do this burning to station men along to watch the burning so that the poles would not catch and burn up. And this labor represents dollars and cents and probably would increase the cost of maintenance considerably. In some certain sections in this burning and slashing probably it would increase the cost from twelve to fifteen dollars per mile," etc. (Record p. 68.)

W. H. Gale, roadmaster of defendant in error, testified upon the same question as follows:

"We have right of way on a part of our track that we have no poles on, and if we go once a year and cut that brush we can cut it irrespective of where it falls. We can let it fall anywhere except next to the fences. When the men are cutting brush they let it fall away from the fence. We do not make any pretense of piling the brush to burn it because it dries out better, and after we come to burn it we can get a better burn because it burns every weed on that right of way. It is our desire always when we burn it—it not only helps to burn the brush, but it sets it back by burning the

roots, and where you have a line of poles you have to protect those poles by cutting around the poles and throwing the stuff back a sufficient distance to save the poles. We have always done it. That has been the practice, and it is quite an item when you come to clear a right of way to clear away and keep it away and save the poles while you are burning it. * * * I would say at least ten or twelve dollars per mile, easily, for the difference in pulling away the brush. There have been a great many of the telegraph company's poles on fire at one time or another. The matter of extinguishing fires requires labor," etc. (Record p. 74.)

He testified, however, that there would be no difficulty encountered in burning old ties because of the presence of this telegraph line (Record, p. 77).

In like manner a number of section foremen testified that in their opinion the presence of the proposed telegraph poles and wires would cause an additional annual expense in cutting and piling brush on the right of way and in burning brush and ties and protecting the telegraph line from being injured thereby.

The plaintiff in error offered the testimony of competent witnesses in rebuttal of the foregoing testimony introduced in evidence by the defendant in error, but this was rejected by the Court, upon the objection of counsel for the defendant in error.

The jury, after being instructed as to the law of the case by the Court, returned a verdict, ascertaining and fixing the compensation to be paid to defendant in error at the sum of \$15,000.

Thereafter, the Court having overruled a motion for new trial, entered judgment thereon, in pursuance of the statutes above quoted. From this judgment the plaintiff prosecutes this writ of error.

SPECIFICATION OF ERRORS.

The trial Court committed the following errors:

I. Horace Middaugh, witness on behalf of plaintiff in error, having testified that he had been engaged in the railroad business about twenty-three years; that he was superintendent of bridges, buildings and track, and had charge of the right of way between Seattle and Sumas, being the right of way involved in this proceeding, between the years 1889 and 1899, inclusive, and an issue in said cause being the damage, if any, to the use and operation of said right of way by the defendant in error railway company for railway purposes by reason of the construction, maintenance and operation of the telegraph line by the plaintiff in error, as proposed in its petition herein, the following question was propounded to said witness, to-wit: "Q. Mr. Middaugh, from your knowledge of the right of way on this line from Seattle to Sumas, what would you say as to whether the construction and maintenance of a telegraph line would cause any injury or damage to

the use and operation of the right of way of the railroad company for railroad purposes; if so, what?" To which question defendant in error objected on the ground that the witness had not shown himself to be qualified. This objection was sustained by the Court, the reason given being that the witness' knowledge of this particular line was confined to too remote a period. (Assignment of Errors, I.)

II. The Court erred in permitting J. E. Craver, witness on behalf of defendant in error, to testify that it cost defendant in error additional expense in protecting certain existing telegraph poles on right of way of defendant in error in doing certain work in which the railway company was then engaged in answer to the following question propounded by the defendant in error, to-wit: "Q. Mr. Craver, I wish you would state to the jury, in doing that work that is being done around the Pilchuck where you are cutting out the grades and making a new fill, whether or not in doing that work, irrespective of the fact of obligations similar to those contained in this petition, if there is any added expense in making your fills around those poles or making your cuts under the poles." To which plaintiff in error objected as irrelevant, immaterial and incompetent, which objection was overruled and the exception of plaintiff in error thereto duly allowed. (Assignment of Errors, III.)

III. The defendant in error, having introduced

in evidence testimony tending to show special damage on account of the construction, maintenance and operation of the proposed telegraph line of the plaintiff in error in clearing and burning the brush on its right of way, in that additional expense would be involved in cutting the brush around the telegraph poles and in piling said brush and burning the same so as to avoid injury or damage to the proposed telegraph poles and wires of the plaintiff in error, the said plaintiff in error sought to prove in rebuttal, by one E. Colburn, civil engineer, a competent and experienced witness acquainted with said right of way, what was the character of the land embraced therein with respect to its susceptibility for growing weeds, grass and brush, and what, if any, would be the additional labor or time required in the periodical clearing of the right of way of brush by reason of the presence of the proposed telegraph poles, and sought to show by said witness that no material additional labor, time or expense would be incurred by the defendant in error in clearing and burning the brush on said right of way by reason of the presence of the proposed telegraph line; to all of which testimony the defendant in error objected on the ground that it was not rebuttal, and the Court erred in sustaining said objection, to which rulings of the Court the plaintiff in error excepted and its exception was allowed. (Assignment of Errors, IV.)

IV. The Court likewise erred in refusing to

permit the witness J. J. Lynch, a competent and experienced person, to testify in rebuttal that the cutting of brush on the right of way of defendant in error would require no additional time or expense because of the presence of the proposed telegraph poles thereon, and erred in sustaining the objection to said testimony on the ground that the same was not rebuttal, to which ruling of the Court plaintiff in error excepted and its exception was allowed. (Assignment of Errors, V.)

V. The Court erred in refusing to give instruction No. 5 requested by the plaintiff in error, which requested instruction reads as follows:

“As I have already indicated, the right of way of the railway company is owned and held by it solely for railroad purposes. It cannot sell, transfer, encumber or use it except as necessity and convenience may demand for the proper operation of its road. It can, therefore, have no market value because it cannot be placed upon the market, either at public or private sale. *In considering the question of compensation to be awarded to the defendant herein, you are therefore instructed that you are not to consider any evidence that may have been introduced or any knowledge possessed by individual members of the jury bearing upon the market value of the right of way, or any portion thereof, or of lands adjacent thereto; for in this proceeding you are called upon to*

consider only the uses to which this right of way is or will be devoted by the railway company on the one hand, and the telegraph company on the other, and to determine to what extent, if any, the use of said right of way by the railway company for railroad purposes will be diminished or damaged by the use which the telegraph company, the petitioner herein, seeks to acquire in this proceeding for the maintenance and operation of its telegraph line." (Assignment of Errors, VI.)

VI. Defendant in error having introduced testimony tending to show that in cutting the brush on the right of way it could not be burned as it fell because of the presence of the telegraph poles and wires, but that additional labor and expense would be required in order to pile the brush so as to avoid injury and damage to said telegraph poles and wires in burning said brush, the Court erred in refusing to give the first paragraph of the 6th instruction requested by the plaintiff in error, which reads as follows:

"You are further instructed that the statutes of the State of Washington do not impose any express duty upon the defendant railway company to cut or burn the brush growing on its right of way, nor to keep the same free from grass, weeds, brush or trees; neither does it impose any such express duty upon the telegraph company. If, however, the defendant

railway company does clear its right of way of timber, slashing, choppings, and brush, then it is made its duty under the laws of this state, as rapidly as the clearing or cutting progresses and the weather conditions permit or at such time as the forester or any of his assistants, or any fire warden may direct, to obtain a permit and to pile and burn the same on such right of way. (Assignment of Errors, VII.)

VII. The Court erred in refusing to give instruction No. 7 requested by the plaintiff in error, which requested instruction reads as follows:

“You are further instructed that if you believe from the evidence that the clearing of brush and other undergrowth immediately surrounding the poles of the telegraph company would require additional time and expense, then the defendant railway company will owe no duty to the telegraph company to cut or remove such brush and undergrowth, and it need not incur such additional expense unless you believe from the evidence that the cutting of such brush or undergrowth immediately around said telegraph poles would be necessary for the safe and proper operation of defendant’s railway trains and business or to prevent the spread of fires from the said railway across its right of way to adjoining lands.” (Assignment of Errors, VIII.)

VIII. The Court erred in refusing to give the 9th instruction requested by plaintiff in error, which requested instruction reads as follows:

“It will be your duty to ascertain from the evidence in this case what will be just compensation to the defendant company for the actual damages, if any, in the use of its right of way for railroad purposes, which may be occasioned by the appropriation by the petitioner of its proposed easement for its telegraph line; in determining this question you are instructed that nothing should be allowed for speculative damages or for such remote or inappreciable damages as the imagination may conjure up.

You are likewise instructed that you must not consider any advantages or benefits which may accrue to the telegraph company from its use of the railroad's right of way, in the assessment of damages. The railroad company can only claim compensation for such damages as will actually result to it in the use of its right of way for railroad purposes, by reason of the construction and maintenance of the telegraph line.” (Assignment of Errors, IX.)

IX. The Court erred in refusing to give the 10th instruction requested by plaintiff in error, which instruction reads as follows:

“You are further instructed that in determining the question of defendant's damages herein,

it will be your duty to take into consideration the nature and extent of the easement which the petitioner, by the terms of its petition filed herein, seeks to acquire, and likewise the stipulations by which it has proposed to bind itself herein. These descriptions and stipulations will by the decree which will be entered herein by the Court, bind the petitioner at all times hereafter and will determine and limit the rights which it acquires by this proceeding. Among other things, the petitioner binds itself that if at any time the defendant railway company, or its successors in interest, shall require for railroad purposes the immediate use of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, it will, at its own expense, remove its line to some other place to be designated by the railway company, adjacent thereto on said right of way, so as not to interfere with the use of said right of way for railroad purposes. It likewise binds itself that its telegraph line will not be erected on any bank or slope of said right of way without the consent of the railway company; and also, that if at any time, said railway company shall require its entire right of way for railroad purposes at any point, the petitioner will, at such point or points, remove its line entirely off the right of way." (Assignment of Errors, X.)

X. The Court erred in modifying the 11th instruction requested by the plaintiff in error by adding thereto and giving the following as a part of its instruction to the jury:

“But by this instruction the Court does not intend to intimate to you in any manner any view which it may entertain as to the amount which you should award the defendant herein.”
(Assignment of Errors, XI.)

XI. The Court erred in giving the 4th instruction requested by the defendant in error, which instruction is as follows:

“You are further instructed that there is nothing in the final decree to be entered herein that imposes any responsibilities upon the petitioner, the Postal Telegraph-Cable Company, with reference to the maintenance of any part of the right of way of the defendant, but that as far as the public is concerned, the same liability is imposed upon the defendant, to care for, clear and protect the same as if the petitioner did not occupy any part thereof.” (Assignment of Errors, XII.)

BRIEF AND ARGUMENT.

Certain general principles, well-settled by judicial decision, are applicable to this proceeding, and as they will necessarily be involved in a consideration of the several errors assigned, it is appropriate

that they should be set forth at the threshold of the argument.

It will be noted that, contrary to the general rule in other states, the framers of the Constitution of the State of Washington declared, as a part of the public policy of that State, that telegraph companies were common carriers, and subject to legislative regulation and control as such. It was therefore deemed important that these common carriers should have the right to secure the most direct and advantageous routes for the establishment and maintenance of their telegraph lines, routes which would cause the least burden and inconvenience both to the corporations and the public. To that end, it was declared in the Constitution that railroad corporations, as one of the conditions of being permitted to acquire and own rights of way throughout the State for railroad purposes, "shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along" such rights of way (§19 Art. XII of the Constitution, quoted *supra*.)

The legislature of the State, in giving effect to the above constitutional provision, made the duty mandatory on railroad companies (R. & B's. Code, §9302, *supra*); and imposed a penalty as damages for failure to comply with these requirements of the Constitution and the law (R. & B's. Code, §9318, *supra*.)

Every railroad right of way in the State of

Washington is held, therefore, subject to the right of a telegraph company to impose upon it the additional servitude arising from the construction and maintenance of a telegraph line thereon, subject, however, to the limitation that such telegraph line shall be so constructed and maintained as not to "incommode the public use of the railroad." The statute, however, provides that "the *right* to construct and maintain such lines shall be secured only by the exercise of the right of eminent domain, as provided by law" (R. & B's. Code, §9314).

It is, therefore, evident that the exercise of this right, so far as relates to the "right of way" of a railway company, is not to condemn and appropriate the land, but merely to impose an additional servitude upon the right of way. As this right of way is already owned and held for a public use, which is not permitted to be incommoded, the only compensation which is to be awarded and paid to the railroad company in contemplation of the law of this State is the diminished value, if any, of the use of such right of way for railroad purposes that may be caused by such additional servitude. Neither the cost nor value of such right of way, nor the cost of its maintenance for railroad purposes, nor the expense to the railway company of discharging the duties it owes to the public or of obedience to the police power and regulations of the State, can be considered. While there is some conflict in the authorities as to the measure of damages in such cases, the

principles laid down in the following decisions must necessarily govern in this proceeding.

C. B. & Q. R. Co. v. Chicago, 166 U. S. 226.

Postal Telegraph-Cable Co. v. Ore. Short Line, 104 Fed. 626.

Postal Telegraph-Cable Co. v. Ore. Short Line (On appeal), 111 Fed. §48.

Postal Telegraph-Cable Co. v. Ore. Short Line, 23 Utah, 474; 65 Pac. 735.

Cleveland etc. R. Co. v. Ohio Postal Telegraph Co., 68 Ohio St. 306; 62 L. R. A. 941.

St. Louis etc. R. Co. v. Postal Telegraph-Cable Co., 173 Ill. 508; 51 N. E. 382.

Mobile & Ohio R. Co. v. Postal Telegraph-Cable Co., 26 So. 371 (Miss.).

Atlantic Coast Line R. Co. v. Postal Telegraph-Cable Co., 48 S. E. 15 (Ga.).

Western etc. R. Co. v. Western Union Telegraph Co., 75 S. E. 471.

While some of the foregoing cases recognize that compensation may be awarded for the space actually occupied by the poles, applying the rule for the ascertainment of damages only as to damages to the remainder of the right of way, such a distinction, though unimportant because of its insignificance, would not constitute an appropriate qualification of the above rule under the constitutional and statutory provisions above quoted.

The leading case on the subject is the decision of the Supreme Court of the United States in *C. B. &*

Q. R. Co. v. Chicago (*supra*). While in that case the question arose in a proceeding to extend a street of the City of Chicago across the right of way of the railway company, the same principles were involved as arise in this case. The Court, speaking by Justice Harlan, there said:

“In its opinion in this case the Supreme Court of Illinois says that when a city council, under the authority of the act of April 10, 1872, extends a street across railroad tracks or right of way, ‘it does not condemn the land of the railroad company nor prevent the use of the tracks and right of way.’ 149 Illinois, 457. We take this to be a correct interpretation of the local statute, and as indicating not only the interest acquired by the public through proceedings instituted for the extension of a street across the tracks and right of way of the railroad company, but also the extent to which the company was deprived, by the proceedings for condemnation, of any right in respect of the land. * * * The land as such was not taken, the railroad company was not prevented from using it, and its use for all the purposes for which it was held by the railroad company was interfered with only so far as its *exclusive* enjoyment for purposes of railroad tracks was diminished in value by subjecting the land within the crossing to public use as a street. (p. 248)
* * * When these proceedings were instituted

the railroad company had an exclusive right to use the land in question for tracks upon which to move its cars, and the city did not propose to interfere in any degree with the enjoyment of that right, otherwise than by the opening of a street across the tracks for public use. To what extent was the value of the company's right to use the land for railroad tracks unduly diminished by opening across it a public street? Under all the circumstances, in view of the purpose for which the railroad company obtained the land, for which the land was in fact used, and for which it was likely to be always used—which purpose is the most valuable one for the railroad company—that was the only question to be determined by the jury. As the right to open a street across the railroad tracks was all that the city sought to obtain by the proceeding for condemnation, it was not bound to obtain and pay for the fee in the land over which the street was opened.” (p. 251.)

It was contended in that case that the opening of a street across the right of way would impose additional burdens of expense upon the railroad company in safeguarding the public against dangers incident to the operation of the road and the maintenance of its right of way, and that proof of such additional expense was admissible for the purpose of showing the compensation due the company. Upon this question the Court said:

“Property thus damaged or injured is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law.” (p. 252.)

And after reviewing the authorities on this subject, the Court proceeds:

“The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated—if all that should be required—necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the State. Such expenses must be regarded as incidental to the exercise of the police powers of the State. What was obtained, and all that was obtained, by the condemnation proceedings for the public was the right to open a street across land within the crossing that was used, and was always likely to be used, for railroad tracks. While the city was bound to make compensation for that which was actually taken, it cannot be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people. And the value to the railroad company of that which was taken from it is, as we have said, the difference between the value of the right to the

exclusive use of the land in question for the purposes for which it was being used, and for which it was always likely to be used, and that value after the city acquired the privilege of participating in such use by the opening of a street across it, leaving the railroad tracks untouched." (pp. 255, 256.)

In the well-considered case of *Atlantic Coast Line R. Co. v. Postal Telegraph-Cable Co.*, 48 S. E. (*supra*), the Supreme Court of Georgia said: (p. 19)

"A burden not imposed by the telegraph line is not an element of damage. Likewise the cost of clearing the right of way, draining the same, and keeping it free from obstructions, which was expense incurred by the railway company for the purpose of operating its railroad, is not to be considered in assessing the damages, because this expense is incurred, not as a result of the construction of the line of telegraph, but because it was necessary to the railway company in the safe conduct of its own business, to do this very work. The right of way is cleared, the natural growth is removed, not to provide a suitable situs for the construction of a telegraph line, but to facilitate and aid the railway company in the operation of its trains. This condition of things existed at the time the telegraph company sought to build its telegraph line, and only to the extent that the telegraph

line interferes with the use of the right of way can the railway company recover damages. In the operation of its railroad, the railway company finds it necessary to burn off the grass and decayed vegetation, and to keep down undergrowth, to protect its tracks from the ravages of fire. Independently of the location of the telegraph line on its right of way, the railway company must continue to perform work of this character for the protection of its own property. What has been done for its own benefit cannot be claimed as an element of damages by reason of the occupancy of its right of way by the telegraph company's line."

Many of the cases hold under similar statutes that the railway company is entitled to only nominal damages.

Postal Telegraph-Cable Co. v. Ore. Short Line, 114 Fed. 788.

Mobile etc. R. Co. v. Postal etc. Co. (Ala.) 24 So. 409.

Mobile etc. R. Co. v. Postal etc. Co. (Tenn.) 41 L. R. A. 403.

Postal etc. Co. v. Ore. Sort Line, 23 Utah, (*supra*).

C. B. & Q. R. Co. v. Chicago, 166 U. S. (*supra*).

Postal etc. Co. v. Oregon etc. R. Co., 104 Fed. 626 (*supra*).

Under constitutional and statutory provisions

such as obtain in the State of Washington, we think the true rule is that in such a proceeding the damages to be awarded are necessarily only slight; and this was doubtless the real view of the courts in the above cited cases.

In *Mobile etc. R. Co. v. Postal etc. Co.*, 24 So. (*supra*), the Supreme Court of Alabama says: (p. 412)

“In the case before us, a very nominal amount of the land constituting right of way is proposed to be taken,—only that part of it occupied by the posts, 175 feet apart, leaving the way for all other purposes unobstructed. It is really an easement in an easement, a servitude, true, for which the company is entitled to some compensation under the constitution. The railroad company, however, holds its right of way so far as is made to appear simply for railroad purposes, and is restricted in its use of the same for such purposes. Under this view of the estate that the railroad company has in its right of way, it is difficult to see how the damages sustained by the road can be anything more than nominal.”

Since under the Constitution of the State of Washington the right is expressly given to impose the additional servitude upon the right of way of a railroad company, the power of eminent domain is exercised only for the purpose of legally enforcing this right by ascertaining and paying the com-

pensation to be awarded therefor. Such compensation is to be measured solely by the diminished value, if any, of the use of the right of way for railroad purposes caused by such additional servitude. In determining this question the proper test is laid down by the Supreme Court of Georgia in the case of *Atlantic Coast Line R. Co. v. Postal etc. Co.*, 48 S. E. 19 (*supra*), as follows:

“Any inconvenience or annoyance resulting from the construction of the telegraph line which is of such a character as *to interfere in any way with the operation of the railroad* by reason of the construction of the telegraph line may properly be considered by the jury in assessing damages, but the evidence must disclose the facts from which such inconveniences or annoyances result. No presumption of fact can be drawn that any special annoyance or inconvenience will result solely because of the construction of the telegraph line.” (Italics ours.)

I.

The Court erred in refusing to permit the witness Middaugh to answer the following question:

“Mr. Middaugh, from your knowledge of the right of way on this line from Seattle to Sumas, what would you say as to whether the construction and maintenance of a telegraph line would cause any injury or damage to the use and operation of the right of way of the railroad com-

pany for railroad purposes; if so, what?" (Record, p. 46.)

The witness had been permitted to answer a like question as applied to the construction and maintenance of telegraph lines on rights of way of railroad companies generally. The above question, however, applied the true test for the ascertainment of the damages, if any, to this particular case. The objection made was solely upon the ground that the witness had not shown himself qualified. The Court, after sustaining the objection, gave his reason as follows: "I think his knowledge of this particular line is confined to too remote a period." If there had been any merit in this view of the Court, it would have affected only the weight of the testimony and not the competency of the witness. In point of fact, however, the witness had been for ten years superintendent of this particular right of way. No suggestion is offered in the record in this case that since his employment terminated there had been any change in the topography, or in the physical condition or character of the railroad or the right of way, and none will be presumed. If the ruling of the Court be correct, plaintiff in error would be dependent for witnesses, expert in the particular railway service, upon the mere chance of finding as such witnesses persons who had recently severed their connection with the railway company. Mr. Midgough being the only expert witness of this character available to the plaintiff in error, the rejection

of this testimony was seriously prejudicial; for it cannot be said that his testimony was merely cumulative to that of the other witnesses of plaintiff in error whose experience had been confined to the telegraph service.

II.

The Court erred in overruling the objection of plaintiff in error to the following question propounded to the witness Craver:

“Mr. Craver, I wish you would state to the jury, in doing that work that is being done around the Pilchuck where you are cutting out the grades and making a new fill, whether or not in doing that work, irrespective of the fact of obligations similar to those contained in this petition, if there is any added expense in making your fills around those poles or making your cuts under the poles.” (Record, p. 95; Assignment of Errors, III.)

This objection should have been sustained. The question related to work being done at the time of the trial by the Railway Company on its grades approaching the Pilchuck River. Any such element of damage was eliminated by the stipulations contained in the petition. These stipulations are binding upon the Telegraph Company. It is well-settled that compensation cannot be recovered for damages avoided by the stipulations of the petition.

Tacoma Eastern R. Co. v. Smithgall, 58 Wash. 445.

Postal Tel. etc. Co. vs. Oregon etc. R. Co. 104
Fed. 627 (*supra*).

Atlantic Coast Line R. Co. v. Postal etc. Co.
48 S. E. 19 (*supra*).

Lewis on Eminent Domain, §732.

Claims of this character are eliminated from this proceeding by the following stipulations in the petition:

“That if at any time the said railway company, its successors or lessees, shall require for railroad purposes the immediate use of any of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, this petitioner will, at its own expense, remove its line to some other place, to be designated by said railway company, adjacent thereto, on such right of way, so as not to interfere with the use of said right of way for railroad purposes. That said telegraph line will not be erected on any embankment or slope or any cut of said right of way, without the consent of said railway company; and if at any time said railway company or its lessees shall require its entire right of way for railroad purposes at any point, the telegraph company will at such point or points remove its line entirely off said right of way.”

III—IV.

The Court erred in refusing to permit the plaintiff in error to introduce in evidence the testimony

of the witnesses Colburn and Lynch. (Record pp. 97-101; Assignments of Error, IV and V.)

The objections to this testimony were made and sustained on the ground that it was not rebuttal. In other words, it was the view of the Court that this testimony, though competent and material, was a part of the case in chief, and might be properly excluded after the conclusion of the testimony of defendant in error. The theory upon which this ruling was based is that the burden of proof is upon the petitioner in condemnation proceedings in the State of Washington; and the error resulted from an improper application of this rule.

In condemnation proceedings, by the great weight of authority, the burden of showing damages which the owner of property will suffer rests on him.

15 Ency. of Law and Procedure, p. 898.

In the State of Washington, however, the rule was early adopted that the burden was upon the petitioner to show the reasonable value of the land sought to be appropriated, and that the petitioner was therefore entitled to open and close both in the presentation of proof and the argument to the jury.

Bellingham Bay etc. R. Co. v. Strand, 4 Wash.
311.

In this proceeding, as we have heretofore pointed out, plaintiff in error is simply exercising a right given by the Constitution to impose an additional

servitude upon the right of way of the railway company, and the only condition of the exercise of this right is that compensation, to be ascertained in this proceeding, shall be made for the damage, if any, resulting from the diminished value of the use of the right of way for railroad purposes. Plaintiff in error in the first instance produced and examined witnesses who testified that the value of the use for railroad purposes would not be diminished by the additional servitude to be created by the construction and maintenance of the proposed telegraph line under the stipulations of the petition. The burden of proving this negative was thus assumed and *prima facie* established by the plaintiff in error.

Where a party has the burden of establishing a negative, full proof is not required, but such proof as renders the existence of the negative probable is sufficient to shift the burden of proof.

1 *Greenleaf on Evidence* (Lewis Ed.) §78.

Beardstown et al. v. Virginia et al., 76 Ill. 37, 44.

People v. Pease, 27 N. Y. 45.

Commonwealth v. Bradford, 9 Metc. 268.

Vigus v. O'Bannon (Ill.) 8 N. E. 778.

The defendant in error did not attempt to meet the testimony offered by the plaintiff in error by any testimony of the same or like character. It qualified no experts and offered no direct testimony that the value of the use of the right of way for railroad purposes would be diminished by reason of the con-

struction and maintenance of the proposed telegraph line under the stipulations of the petition. It did, however, introduce testimony by which it sought to show certain elements of special damages. The chief of these, if not the sole one not excluded by the stipulations of the petition, was the testimony offered by its several witnesses tending to show that an additional annual expense would be imposed upon the Railway Company in cutting, piling and burning the undergrowth upon its right of way. It was this testimony which the plaintiff in error sought to rebut by the witnesses Colburn and Lynch. It seems to us clear that such alleged damages, when claimed, are special, and that in order to permit a fair trial the right to rebut must exist. That such a claim would be made by the defendant in error could not have been reasonably anticipated by the plaintiff in error. It has, indeed, been held by the courts that damages from the added expense of clearing and burning undergrowth on the right of way are too remote to be allowed.

Postal Tele. etc. Co. v. Ore. etc. Co. 23 Utah
(*supra*).

S. W. Tel. etc. Co. v. Gulf etc. R. Co., 52 S.
W. 107.

Atlantic etc. R. Co. v. Postal etc. Co., 48 S. E.
19 (*supra*).

While it is undoubtedly appropriate to apply the rule, in a proper case, that the answering testimony of the defendant tending to establish general

damages may not be rebutted by testimony of the same general character as that given in chief and in defense, this rule is clearly not applicable when the defendant for the first time asserts by the testimony offered in defense a claim for special damages. Suppose, for example, the defendant had introduced testimony that the proposed telegraph line of the petitioner would interfere with signal service wires installed or to be installed upon its right of way for the safe operation of its railroad. Such a claim could not be anticipated by the petitioner, especially where no defensive pleading is required to be filed. Yet it cannot be doubted that the petitioner would be entitled to meet such proof by the testimony of electricians, with such experience as to render them competent as expert witnesses, that there would be no such interference and that such claim was merely fanciful.

It will be observed that in adopting the rule as to the burden of proof, the Supreme Court of the State of Washington in *Bellingham Bay etc. R. Co. v. Strand*, 4 Wash. (*supra*), followed the decision of the Supreme Court of Illinois in *McReynolds v. Burlington etc. R. Co.*, 106 Ill. 152.

The Illinois courts have, however, since held that where the defendant claims special damages such as damages to the remainder, and introduces evidence in support of such claims, the petitioner may introduce rebutting evidence.

Chicago etc. Ry. Co. v. Phelps, 17 N. E. 771.

Hartshorn v. Ill. etc. Ry. Co., 75 N. E. 122,
125.

See also the earlier case of

Village of Hyde Park v. Dunham, 85 Ill. 569,
573.

This question has never been passed upon by the Supreme Court of the State of Washington, but it must be assumed that having adopted the original rule from the decision of the Illinois Court, the qualification or rather the application of that rule by the latter Court would likewise be followed. The testimony which was sought to be rebutted was the principal, if not the sole, testimony upon which the excessive verdict of the jury could have been based, under the instructions given by the Court. Plaintiff in error had a number of witnesses by whom it was prepared to rebut this testimony; and of this fact the Court was advised when the testimony was rejected (Record, p. 99). The rejection of the proffered testimony was seriously prejudicial to the plaintiff in error.

V.

The Court erred in refusing to give the fifth instruction requested by the plaintiff in error (Assignment of Errors, VI).

It is conceded that every portion of this instruction was sufficiently covered by others given by the Court, except the following:

“In considering the question of compensation to be awarded to the defendant herein,

you are therefore instructed that you are not to consider any evidence that may have been introduced or any knowledge possessed by individual members of the jury bearing upon the market value of the right of way, or any portion thereof, or of lands adjacent thereto."

The portion of the instruction above quoted was clearly correct. In view of the circumstances connected with the trial and of the verdict of the jury, it should have been given, and its refusal was prejudicial error.

VI.

The Court erred in refusing to give the following instruction requested by plaintiff in error (Assignment of Errors VII.):

"You are further instructed that the statutes of the State of Washington do not impose any express duty upon the defendant railway company to cut or burn the brush growing on its right of way, nor to keep the same free from grass, weeds, brush or trees; neither does it impose any such express duty upon the telegraph company. If, however, the defendant railway company does clear its right of way of timber, slashings, choppings, and brush, then it is made its duty under the laws of this state, as rapidly as the clearing or cutting progresses and the weather conditions permit or at such times as the forester or any of his assistants, or any

fire warden, may direct, to obtain a permit and to pile and burn the same on such right of way."

There is no statute law in the State of Washington imposing any express duty upon a railway company to keep its right of way clear even from combustible material. The only statute relating to the subject is as follows:

"Every one clearing right of way for railroad, wagon road or other road, shall pile and burn on such right of way all refuse timber, slashings, choppings and brush cut thereon as rapidly as the clearing or cutting progresses and the weather conditions permit, or at such other times as the forester or any of his assistants, or any warden, may direct, and before doing so shall obtain a permit." (Sessions Laws, 1911, p. 634.)

Witnesses for defendant in error testified that an additional annual expense was caused to the Railway Company in being compelled to cut and remove the brush and pile it away from the poles and wires and to guard the fires until the brush was burned, in order to avoid injuring the telegraph poles and wires. But as the Railway Company cannot lawfully clear and burn the brush except in accordance with the statute, any additional expense incident thereto must be borne exclusively by the Railway

Company under the authorities heretofore cited, and cannot be imposed upon the Telegraph Company. If this element of damage were eliminated from the case, there would, under the stipulations of the petition, be no substantial basis upon which the excessive verdict of the jury could rest.

The Court, on the other hand, instructed the jury that "The law requires a railway company to use reasonable diligence in keeping its right of way clear from inflammable material, and that where it fails to do so, and damage results therefrom, the railway company is liable." Thus the jury were left to draw an inference directly converse to the law as stated in the instructions Nos. 6 and 7 requested; and this, notwithstanding it is the settled law that in the absence of a statute it is not negligence *per se* to permit brush, etc., to grow or accumulate on a right of way, the question of negligence being one of fact for the jury.

Union Pac. Ry. Co. v. Gilland (Wyo.), 34 Pac. 953.

Perry v. S. P. R. R. Co., 50 Calif. 579.

R. R. Co. v. Shanefelt, 47 Ill. 497.

R. R. Co. v. Mills, 42 Ill. 411.

Spencer v. R. R. Co. (Mont.), 27 Pac. 682, 683.

As we have heretofore seen, plaintiff in error was entitled to have the jury correctly instructed concerning the duties imposed upon the railway

company by the regulative provisions of the statutes of the State.

C. B. & Q. R. Co. v. Chicago, (*supra*), pp 255, 256.

(And see, *ante* p. 31-2.)

VII.

The Court erred in refusing to give the following instruction (No. 7) requested by plaintiff in error (Assignment of Errors, VIII) :

“You are further instructed that if you believe from the evidence that the clearing of brush and other undergrowth immediately surrounding the poles of the telegraph company would require additional time and expense, then the defendant railway company will owe no duty to the telegraph company to cut or remove such brush and undergrowth, and it need not incur such additional expense unless you believe from the evidence that the cutting of such brush or undergrowth immediately around said telegraph poles would be necessary for the safe and proper operation of defendant’s railway trains and business or to prevent the spread of fires from the said railway across its right of way to adjoining land.”

This instruction was manifestly a correct statement of the law, and its refusal was gravely prejudicial. The witnesses for the defense based their

estimates of added annual expense largely upon the claim that it would require more time and labor to cut the brush and undergrowth immediately around the poles and to remove and pile it so as to avoid injury or damage to the poles and wires when they were burned. As the plaintiff in error was not permitted to rebut this testimony and to show how chimerical and fallacious it was, it was the more important that the jury should have been properly instructed upon the subject. If the cutting and burning of the brush about the poles was necessary only for the convenience and safety of the telegraph line, then the duty to cut and burn it would devolve alone upon the telegraph company. It could not devolve upon the railway company to incur such additional expense, unless it appeared to the jury from the evidence in the case that such expense would necessarily be incurred by the defendant in error to secure the safe and proper operation of the railway company's trains and business and to prevent the spread of fires to adjacent property. The principle involved is so self-evident that, so far as we are able to discover, the question has never been presented to the courts for consideration, except in the case of *Postal Tele. etc. Co. v. L. W. R. Co.*, 22 So. 219, 222. In that case it is said:

“We think the poles are sufficiently removed from defendant's track to justify our designating danger from the same as a remote danger even as to the sidings. The railroad right of

way has been already fenced in (in their own interest) in almost its entire length. Defendants are not called on to make any change in the same, in the interest of the plaintiffs; *nor will they be specially called on, in the interest of the latter, to keep their right of way clear of grass, to guard plaintiff's poles from danger from fire.* Railroad companies are under a general obligation to keep their tracks free from combustible materials, *but the plaintiffs in voluntarily seeking to place their line along defendants' right of way, assume certain risks, and also the obligation of taking the necessary steps and precautions for the protection of their own property from fire, and for the operation of their line.* Defendants' fear of danger of liability from the presence of the telegraph poles on their right of way is greatly exaggerated, if it exists at all." (Italics ours.)

VIII.

The Court erred in refusing to give the ninth instruction requested by the plaintiff in error (Assignment of Errors, IX). The following language in this instruction was not covered by any other instruction given by the Court:

"You are likewise instructed that you must not consider any advantages or benefits which may accrue to the telegraph company from its use of the railroad's right of way, in the assess-

ment of damages. The railroad company can only claim compensation for such damages as will actually result to it in the use of its right of way for railroad purposes, by reason of the construction and maintenance of the telegraph line."

This instruction was requested for the purpose of preventing the effect of an appeal to the jury for the allowance of excessive damages on the ground that in going upon the right of way of the railway company, the petitioner was saved the necessity of acquiring by condemnation and of then clearing and improving another sufficient right of way between the termini of the proposed telegraph line. It was requested in order to prevent the jury from being misled as to the very object of the constitutional and statutory provisions of the State of Washington. That such is the law even in the absence of such constitutional and statutory provisions, see:

R. R. Co. v. Tele. Co., 48 S. E. 15 (*supra*), where it is said:

"That the right of way may possess peculiar advantages and benefits to the telegraph company in the construction and maintenance of its line is not a proper element in the estimate of damages."

California etc. R. Co. v. S. W. Tele. Co., 52 S. W. 86, where it is said:

“What extraordinary advantages might accrue to the telegraph company by being accorded the use of land already cleared of brush and other obstructions should not enter into consideration in fixing the damages to appellant, because it is clear that its damages have not been enhanced by the great advantages obtained by appellee in using its right of way.”

Texas etc. R. Co. v. Postal etc. Co., 52 S. W. 108, where it is said:

“Under no conceivable state of facts could the value of the use of the right of way to appellee be made the measure by which to determine the damages sustained by appellant.”

IX.

The Court erred in refusing the tenth instruction requested by plaintiff in error (Assignment of Errors, X).

It is true that the Court called the jury's attention to the petition, giving the substance thereof in its first instruction, and advised the jury that they were to consider the stipulations contained in the petition. But in view of the fact that the estimates of annual expense given by the several witnesses for the defendant in error embraced numerous elements not in any wise segregated or distinguished by the witnesses in giving their estimates, and which elements, under the stipulations, could not be consid-

ered in arriving at the true measure of damages and in ascertaining the proper sum to be returned as their verdict, plaintiff in error was entitled to have its instruction given as requested. Because of the state of the evidence, the Court should have specifically instructed the jury respecting the stipulations which must guide them in weighing the evidence and arriving at their verdict.

X.

The Court erred in modifying instruction No. 11 requested by plaintiff in error by adding the words at the conclusion thereof:

“But by this instruction the Court does not intend to intimate to you in any manner any view which it may entertain as to the amount which you should award the defendant herein.”
(Assignment of Errors, XI.)

The instruction as requested was a correct statement of the law. The added statement of the Court was wholly unnecessary and was calculated to weaken if not destroy the force of the instruction requested.

XI.

The Court erred in giving the fourth instruction requested by defendant in error (Assignment of Errors, XII).

The error of this instruction is rendered apparent by what is said under subdivision VII of this brief.

For the several reasons here presented, the judgment should be reversed and the cause remanded for a new trial.

Respectfully submitted,

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Plaintiff in Error.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

POSTAL TELEGRAPH-CABLE COM-
PANY OF WASHINGTON, a Coropr-
ation,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY
COMPANY, a Corporation,

Defendant in Error.

No. 2268.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION

BRIEF OF DEFENDANT IN ERROR.

C. H. WINDERS,
Seattle, Washington,
Attorney for Defendant in Error.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

POSTAL TELEGRAPH-CABLE COM-
PANY OF WASHINGTON, a Coropr-
ation,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY
COMPANY, a Corporation,

Defendant in Error.

No. 2268.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This proceeding is an ordinary condemnation proceeding, brought under the eminent domain stat-

utes of Washington for the purpose of acquiring a right-of-way for a pole line on the respondent's right-of-way between Seattle and Sumas on the international boundary, a distance of something over 120 miles. A preliminary order was entered and in due course the case proceeded to trial before a jury, on the question of damage, and is now for review in this court upon certain errors assigned and directed to matters occurring at the trial, upon such question. The only errors assigned and argued are as to exclusion of testimony and as to certain instructions refused by the court, and a transcript of only such part of the proceedings has been filed as pertains to the errors assigned.

ARGUMENT.

A considerable part of the brief of plaintiff in error is taken up with a quotation and discussion of the various constitutional and statutory provisions under which it was given the right to file and prosecute this proceeding. Both the Federal act and acts similar to the eminent domain statutes of the State of Washington have been passed upon by the courts so often that a discussion of these constitutional and statutory provisions seems unnecessary, the rule being well established that compensation must be paid in a proceeding of this kind

prior to obtaining a perpetual easement or right to maintain a pole line by a corporation such as contemplated by the federal statute governing the control of telegraph companies.

Western Union Tel Co. vs. Pacific R. R.,
195 U. S. 540; 49 L. Ed. 312.

Western Union Tel. Co. vs. City of Richmond, 224 U. S. 160; 56 L. Ed. 710.

*State ex rel Spokane & British Columbia
Tel. & Tel. Co. vs. City of Spokane*, 24
Wash. 53; 63 Pac. 1116.

Notwithstanding the lengthy quotations, we do not understand that counsel contend that the rights which are sought to be acquired by the petitioner in this case could be acquired excepting under a contract with the defendant in error or by paying compensation to be fixed by a jury in a proceeding of this character. It is elementary that no rights are acquired under the federal act, *Western Union Tel. Co. vs. Penn. R. R. supra*; and under Section 9314 of Remington & Ballinger's Codes of the State of Washington no rights can be acquired until due compensation has been fixed and paid.

After the entry of the preliminary order of

necessity, there was only one question raised under the petition in this case and that was the amount of damage to which the defendant in error was entitled for the rights sought to be acquired. Nor is there any question but that the stipulations contained in the petition must of necessity enter the final decree, and that the case as far as the question of damage is concerned must be tried in view of the stipulation as contained therein. We mention these matters here for the reason that a great part of the brief of plaintiff in error is taken up with a citation of statutes and authorities which were before the court below and given effect by it upon the trial.

Pages 25 to 35 of the brief are then taken up with a discussion of the measure of damage in a case of this character. No exceptions to the rule adopted by the trial court were taken and no error assigned upon the question in this court, and the record having to do with this question is not before the court; and it is sufficient to say that the trial court followed the rule as contended for by counsel for the plaintiff in error, and admitted evidence only upon questions going to show the depreciation in value of the use of this 120 miles of right-of-way by reason of the proposed construction of pe-

titioner's telegraph line as outlined in its petition, and subject to the stipulations contained therein, no evidence admitted in respondent's case was excepted to and the argument of counsel upon this question which in this case is not directed to any exception reserved or error assigned is purely academic, and must have been made by counsel for the reason that he could not make any showing by devoting his argument to the errors he assigned, for to repeat no error is assigned by the plaintiff in error as to any evidence offered to show damage, or as to any instruction given by the court upon such question. The only complaint made in the brief is that the witness Middaugh should have been permitted to answer one question propounded, that the witness Craver was permitted to answer one question which was improper, that the court erred in refusing to admit certain testimony on rebuttal, and refused to give certain requested instructions, which are not to be found in the record. No other errors are assigned or argued, and we believe we will be following good practice and the convenience of this court in refusing to argue academic questions, but, in devoting this brief to the errors assigned and argued.

Assignment of Error No. 1.

It is contended that the lower court erred in refusing to permit the witness Middaugh to answer one question which is set forth on page 35 of the brief, and found on page 46 of the record. An examination of the testimony of Mr. Middaugh will show that he did testify generally in answer to the identical question. The objection was sustained to the particular question for the reason that it was confined to the particular right-of-way involved in this case, concerning which Mr. Middaugh had no knowledge for more than thirteen years. It is true that the witness was superintendent of bridges on this particular line up to the year 1899 (Record p. 43), but it is also shown that he had not been engaged in railroad work for thirteen years (Record p. 49) and that he had not even rode over this line for over six years (Record p. 49). In other words, it was shown that the witness had no familiarity with this particular right-of-way since 1899, had not been engaged in railroading for thirteen years, and as far as the record shows, was not posted on the question of present day methods of either maintenance of way or safe operation.

The witness had already been permitted to testify as an expert over the objection of the defend-

ant in error, that the appropriation of a right-of-way and the construction of a telegraph line under stipulations such as contained in the petition would not cause any injury or damage to the right-of-way of a railroad company, and not depreciate the value of its use for railroad purposes (Record pp. 45 and 46), and his opinion as an expert was already before the jury.

The argument that is made in support of this assignment is based upon the theory that experts not familiar with a particular line of railroad would be disqualified. This argument is unsound for the reason that the witness was permitted to testify generally as an expert, and an objection was sustained only when it was attempted to ask the witness with reference to this particular line concerning which he had no familiarity for more than twelve years. It certainly will not be contended that experts such as referred to in the argument of counsel would be permitted to testifying as to a particular piece of right-of-way concerning which they had no knowledge.

The qualification of an expert witness is largely within the discretion of a trial court. The jury already had his expert opinion and there is nothing in the record or in the briefs to show that the

plaintiff in error was in any way prejudiced even if the witness was qualified. The same matters were gone over with him on both direct, cross and re-direct examination, and he repeatedly gave it as his opinion that there was no damage sustained by reason of the proposed construction of the petitioner's line, the jury did not misunderstand his attitude or testimony.

Assignment of Error No. 3.

Considering the alleged error of the court in overruling an objection made to *one question* asked of the witness Craver, we desire to consider the manner in which this case was tried by the plaintiff in error. Even in the portion of the record which is printed and is before the court, it appears that the petitioner for some reason of its own went into the question of its past performances, it at the time of the trial maintaining a pole line over this right-of-way under contract; and its counsel as will be shown by the record and also by the rulings made by the learned district judge attempted to show the jury that in the past there never had been any damage sustained by the company by reason of the manner in which the postal poles had been maintained, and adduced testimony in his case that in the future poles would be maintained

in the same manner as in the past. We quote from the testimony of the witness Blake:

“Q. In the course of your duties were you frequently required to pass over and along this road and this right of way and inspect the right of way and your telegraph line and wires?

A. I was over the right of way very frequently up to five years ago. I have been over it about once a year since then, I think.

Q. *Have you ever known of any instance where the existence of your telegraph line has caused any interruption to the operation of the railroad?*

A. No sir.

Q. *Or any interference with the uses and operation of the railroad, or of the use of the right of way for railroad purposes?*

A. No sir.” (Record p. 32).

And further upon re-direct examination of Mr. Forehand counsel refers for the first time to the very subject matter referred to in the question complained of (Record p. 59):

“Q. As to the situation, say at Pilchuck, if complaint were made by the railroad company or a request to change a pole, could you do so?

A. Yes.

Q. Would you do so?

A. Yes."

The witness Blake, in petitioner's case on cross-examination, further testified:

"Q. In stating your opinion to this jury of no damage, were you basing that upon conditions as they exist at this time in your pole line along the right of way?

A. Yes." (Record p. 41).

It will also be borne in mind that under the petition, the Telegraph Company acquired the right in all cases to use all that portion of the right-of-way between a line five feet from the outer edge thereof, and a line twenty-five feet from the center of the main track, so that in all cases they had a right to use all the right-of-way from a point between a line twenty-five feet from the center of the track and five feet from the outer edge of the right-of-way and reserved the further right to place poles even closer than twenty-five feet from the track and even between the tracks where it was impossible or *impracticable* for them to place them at a point that distance therefrom, the petition reading:

"where the location of the main track upon the right-of-way, or the location of buildings, tracks, or other improvements or obstructions upon the right-of-way may make it impossible

to place the poles upon that portion of the right-of-way above described, in which event the poles will be placed upon the most practicable remaining portion of the right-of-way consistent with the safe and proper construction of said telegraph line."

It will also be borne in mind that in their own case it was testified by their own officials that they would probably under this petition and under the stipulation which I have quoted above, assert the right to set poles between the main running track and spurs leading off therefrom, so that their poles would be between the main track and side tracks (Record p. 55). They had such right under the petition, and the only question that was asked Mr. Craver was as to the *additional expense* if any in the maintenance of the right-of-way *if the stipulations* as set forth in the petition *were complied* with, by reason of improvement work similar to that referred to by petitioner's counsel in its own case. We call the court's particular attention to the fact that long prior to Mr. Craver being called, the matter of this work at Pilchuck was taken up by counsel for the plaintiff in error, and his witness, Mr. Forehand, president of the petitioner company, referred thereto (Record p. 59). The question asked Mr. Craver was perfectly competent, and

had in view the obligations as contained in the petitioner's petition, which we do not question become a part of the decree, and we cannot believe that the foregoing error is urged with any seriousness.

Assignments of Error 4 and 5.

We have already pointed out the theory upon which the plaintiff in error tried this case. By direct examination of his own witnesses he first showed that they were familiar with the pole line which is now upon the right-of-way, and in answer to questions propounded by counsel, his own witnesses testified that as the new line would be similar to the pole line as now constructed the right-of-way was not depreciated in value for railroad purposes. This testimony it is true, was incompetent and immaterial, but was offered by petitioner and went in without objection on our part. He also showed from his own witnesses, after qualifying them as experts, that a pole line constructed in the manner as set forth in the petition, subject to the stipulations contained therein, would not damage the defendant in error in any sum whatsoever. Upon cross-examination of his witnesses, excepting the witness Middaugh it was shown that they had not taken into consideration any damage or added expense incident to the maintenance of the right-

of-way by reason of the protection of the Railway Company's property and the safety of its operation by clearing its right-of-way, by reason of handling ties, and by reason of interference with team track facilities. These matters were all put before their witnesses upon cross-examination during the first day of the trial of this case. The witness Middaugh was then called. He was asked as to his familiarity with this particular right-of-way, having formerly been employed as a superintendent of the predecessor in interest of the defendant in error, and was asked as to the damage if any under the terms of the petition under which this proceeding was tried. He was also asked on cross-examination what additional allowance, if any, was made in the necessary maintenance of the right-of-way by reason of the presence of telegraph poles, and he testified that there was little, if any additional expense. The petitioner, then upon re-direct examination went into the very matters with this witness, in his own case, concerning which he is complaining that the lower court refused to permit him to go into on rebuttal.

Referring to Mr. Middaugh's testimony, upon cross-examination he testified that it was necessary in good railroading to keep the right-of-way clear

from combustible material, further testified that there was no additional expense incident to maintaining such right-of-way by reason of the presence of telegraph poles, and in order to bring out this testimony even stronger before the jury, the petitioner on re-direct examination put the following evidence before the jury:

“Q. (Mr. Hughes) Did you testify that in your experience in the cost of keeping clear of brush of the right of way that the entire right of way would be a dollar and a half to six dollars per mile?

A. No sir; per acre.

Q. That covered the whole of the right of way?

A. That covered the whole right of way.

Q. *Would the presence of telegraph poles add any appreciable amount to that expense?*

A. *No.*” (Record p. 49).

In view of the whole testimony and of the testimony which has just been quoted it comes with bad grace for the plaintiff in error to urge that it should be permitted to go into this same matter upon rebuttal, all his witnesses were presented as experts and men qualified to speak on the question of damage, they were told to consider the rights sought to be acquired and testify to the damage

if any, they assumed the burden of advising the jury, and if they were experts they considered every element properly entering into the question of damage.

It is apparently conceded that under the law of the State of Washington, the burden is upon the petitioner in a case of this character to show the reasonable value of the land, or as in this case, of the easement sought to be appropriated, and in the ordinary condemnation proceeding the burden is upon the petitioner to show not only the value of the property taken, but the damage to the remainder.

(Section 921, Remington & Ballinger's Annotated Codes and Statutes of Washington. See brief of plaintiff in error, p. 5).

Bellingham Bay & B. C. R. R. vs. Strand, 4 Washington 311; 30 Pac. 144.

The question of the admissibility of testimony upon rebuttal it is true is largely a matter within the discretion of the trial court, but we believe that it would have been an abuse of discretion if in a case of this character the trial court had permitted the petitioner to put in part of its case after the respondent had introduced its testimony. The

burden was upon the petitioner to put before the jury evidence showing the compensation to which the respondent was entitled. Upon cross-examination of the expert witnesses the respondent had a right to show what elements were taken into consideration, and to get their opinion as to whether they considered any condition that would arise and that would result in damage, and upon re-direct examination petitioner had a right to, and did go into the testimony which was developed upon such cross-examination, and all the various elements of damage or claimed damage were brought out either upon direct or re-direct examination. The law in a case of this character is as is shown by the authorities, that the measure of damage is the diminution in value of the use of the right-of-way, and as said by the courts, this is a question of fact to be determined by the jury, and it is evidence of facts showing such damage which is competent, and it was only such evidence that was adduced by the respondent. No objection was made at the time of the trial that this testimony was incompetent. In fact it was so conceded and no error has been assigned to the point that it was incompetent. In fact, as will be hereinafter pointed out, the petitioner by its requested instructions so recognized. Some cases are cited which are not perti-

ment to the issue discussed, in which a general statement may be found to the point that evidence of the cost of clearing right-of-way is not a proper element of damage, and while this question is not raised we do state that no authority based upon reason can be cited to this court which holds that the added expense incident to the proper maintenance of a railroad right-of-way is not a proper item of damage to be put before the jury. It is not the expense of clearing a right-of-way, but the added expense of maintaining the right-of-way by reason of the presence of the telegraph poles, and it is idle to argue that a railway company can properly maintain its property with a line of poles zigzagging across its right-of-way, and with the consequent inconvenience of handling material and using its facilities, for an annual return for a distance of 120 miles at even the figure as testified to by its witnesses.

We believe that the reasoning as set forth in the cases of *Cleveland etc. Ry. vs. Ohio Postal Tel. Cable Co.*, 67 N. E. 894, and *American Telephone & Telegraph Co. vs. St. Louis etc. Ry.*, 101 S. W. 585, and the authorities therein referred to are sound. However, this discussion neither adds to nor takes from the error which is assigned.

The only cases which are cited in support of this assignment of error are the three cases from the Supreme Court of Illinois. It appears that under the statute of that state in an eminent domain proceeding, the petitioner is not required to introduce proof of damage if any, to property which is not taken. Such is not the statute of the State of Washington, which requires of and places upon the petitioner the burden of proving the value of the land not only taken, but the damage to the remainder.

If the statute, however, was as in Illinois, the plaintiff went into the same question which it sought to go into on rebuttal and the action of the trial court was not an abuse of discretion.

The rule is well settled in cases of this character that the burden being on the petitioner and it being required to go into all questions of damage in its case in chief, it is not proper to go into the same questions on rebuttal.

Seattle & Montana Ry. Co. vs. Reeder, 30 Wash. 253; 70 Pac. 498.

In this case petitioner attempted on rebuttal to show that certain parts of a ledge was shale, the court held as the matter had been referred to in

petitioner's case in chief such evidence was improper on rebuttal.

The burden being upon the petitioner to put before the jury all elements of damage in its case in chief, and it having offered testimony of witnesses vouched for as being competent upon this question, there was no abuse of discretion on the part of the trial court in refusing to permit petitioner to go into this matter a second time.

38 Cyc., 1355.

Marande vs. Texas & P. Ry. Co., 124 Federal 42.

Erie R. Co. vs. Kennedy, 191 Federal, 332.

Mitchell vs. City of Boston, 102 N. E. 127.

To have permitted the petitioner, after having gone into this question to have divided its evidence, would have been to permit it to gain an advantage which is not contemplated in the trial of a case. As stated, the admission of testimony in rebuttal is largely within the discretion of the trial court, and before this court could in any event hold that there was such an abuse of discretion as to authorize a reversal of the lower court, it must find that

the petitioner was prejudiced, and in view of the positive statements of damage made by its witnesses; and in view of the fact that the same matter was covered in its own case by the witness Middaugh, and was called to the attention of each of its other witnesses on cross-examination, its rights cannot under any view of the case be held to have been prejudiced.

Stillwell etc. Co. vs. Phelps, 130 U. S. 520;
32 L. Ed. 1035.

Press Publishing Co. vs. Monteitte, 180 Federal, 356.

Security Trust Co. vs. Robb, 142 Federal 78.

Hornbuckle vs. Stafford, 111 U. S. 389; 28 L. Ed. 468.

Further, as to the witness Colburn, there is nothing in the record to show that he was competent or qualified to testify upon this question, and the record will show that the witness Lynch was on the stand, and gave his testimony on the question of damage after all the matters referred to had been gone into on both direct and cross-examination in the petitioner's case in chief.

Assignments of Error 6, 7, 8, 9, 10, 11 and 12.

These assignments of error have to do with requested instructions which were refused or modified, excepting the last which is directed to error in giving the fourth instruction requested by the respondent.

There is nothing in the bill of exceptions to show what requested instructions were filed by either the petitioner or respondent. The only statement with reference thereto is found on page 101 of the record wherein it is recited that the petitioner and the respondent each filed with the clerk their respective requests in writing for instructions. The requested instructions, however, are not set forth or certified, nor is there anything in the bill of exceptions to show why they were refused. We cannot understand how this court can pass upon these exceptions without there being something in the record to show that they were presented and were so presented as to entitle the petitioner to have them considered by the court.

Metropolitan Railroad Co. vs. Macfarland,
195 U. S. 322; 45 L. Ed. 219.

Elane vs. United States, 159 U. S. 590; 40 L.
Ed., 269.

Nelson vs. Flint, 166 U. S. 276; 41 L. Ed. 1002.

National Cash Register Co. vs. Salling, 173 Fed. 22 (C. C. A. 9th).

Considering, however, for the purpose of argument, that the plaintiff in error can under the record urge the exceptions directed towards the refusal of the court to instruct, we will briefly direct the court's attention to the argument as contained in its brief.

I.

The proposed instruction discussed under subdivision 5 of their brief (Assignment of Error 6) and advising the jury that they were not to consider the market value of the land appropriated, was fully covered by the instructions given by the court. In its charge the court instructed the jury as follows:

“As a *railroad right of way* can only be used for railroad purposes, it *has no market value as land*, and when a telegraph company seeks to condemn an easement for its lines, the just compensation must be arrived at by considering how much the use of the right of way for railroad purposes is diminished in value by

the presence of the telegraph line. That is, *the measure of damages* is the diminution in value of the right of way for railroad purposes caused by the construction, maintenance and operation of the telegraph line, and *in determining this question you should take into consideration all the stipulations contained in the petition* pertaining to the manner in which the petitioner will exercise the easement in question, *the substance of which petition and the stipulations therein contained has already been read to you.*

While *the just compensation* which it is your duty to award, *must be arrived at by considering how much the use of the defendant's right of way for railway purposes is diminished in value* by the presence of the telegraph line of the petitioner, *to be constructed pursuant to the stipulations contained in the petition, you are instructed that in arriving at such amount you are not to award anything for remote contingent or speculative consequences."* (Record, p. 109).

It would be difficult to state the law of the case in any clearer language, or more favorable to the contention made by the petitioner. The court had already stated that the only recovery would be that

of the diminution in value of the use of the right of way for railroad purposes.

II.

Under subdivision 6 of the brief, (Assignment of Error Number 7), counsel urge that the court should have instructed the jury that there was no statute requiring a railroad company to clear its right of way. The court did instruct the jury that under the law a railroad company was required to use reasonable diligence in keeping its right-of-way clear from inflammable material, and if it failed to do so, and damage resulted as a consequence thereof, the railroad company would be liable; specifically, however, instructing the jury that it was not to consider as an element of damage the cost of clearing the right of way unless that cost was increased by reason of the construction of the telegraph line as proposed by the petitioner in its petition. (Record, pp. 106-107). No exception was taken to the instruction as given.

This is the law, irrespective of any statute, as repeatedly announced by both the Supreme Court of the State of Washington, and the federal courts.

Firemans Fund Insurance Co. vs. No. Pac. Ry., 46 Wash., 635; 91 Pac. 13.

Eddy vs. Lafayette, 49 Fed., 807 (C. C. A. 8th); 163 U. S. 456.

2 Thompson on Negligence, Sec. 2270.

The court, after referring to this duty, said:

“The expense thereof would not be chargeable to the petitioner herein in this proceeding; provided, however, that if you find from the evidence that the necessary expense thereof would in any material or substantial degree be increased by reason of the construction and maintenance of the proposed telegraph line upon said right of way, such additional expense, if any, may be considered by you in arriving at your verdict. In considering that question, however, you are instructed that you are not to consider mere fancied or imaginary difficulties, obstructions or obstacles, but only such as are substantial and appreciable.”

No exception was taken to any part of this instruction, nor was any exception taken during the trial to evidence which warranted the giving of this instruction, and no error is assigned that this instruction is not the law. The subject matter therefore having been fully covered, and the proposed instruction not being applicable to any issue, was properly refused.

New York, Lake Erie etc. Ry. vs. Winters,
143 U. S. 60; 36 L. Ed. 71.

There is a further matter which counsel apparently overlooks and that is the railroad company has a right to conduct its business, and in doing so, to use reasonable business judgment. The testimony shows that for reasonable railroad operation it is necessary to clear, and keep cleared, its railroad right-of-way. It makes no difference whether it is necessary for the purpose of protecting the company from damage suits by reason of spreading of fire, or for the purpose of making its operation more efficient, if it is reasonably necessary so to do. It is not for the petitioner to say that the statute law does not make it absolutely imperative. The petitioner has the right to construct its pole line along this right-of-way upon paying compensation, but it does not have the right in determining the question of damages, to require the railroad company to cease using good business judgment in the maintenance of its property; and if in the use of such business judgment it is necessary to expend more money for efficient operation and safe railroading by reason of the presence of the Postal Company's poles, then the Railroad Company is damaged in that amount. The court told the jury that they

could not consider remote or contingent or imaginary difficulties, and should not consider this question from the standpoint of damages unless the damages were substantial.

III.

Subdivision 7, (Assignment of Error 8), was fully covered by the instructions given by the court and already set out. We note that counsel says that they were greatly prejudiced by failure of the court to give this instruction, which in effect is that the Railroad Company would be under no duty to the Telegraph Company to cut or remove brush; but this instruction which was proposed by counsel, embodied almost the identical language used by the court, and hereinabove quoted, counsel evidently agreeing that if there was an additional expense in cutting brush and caring for the right-of-way by reason of the presence of the telegraph poles, either for the purpose of affording safe operation or preventing the spread of fire, that then the jury should take that into consideration. The instruction as given by the court on page 107 of the record, and which we have referred to under the preceding subdivision, puts this matter before the jury in even more clear and concise language.

As we have said above, it was never urged that the Postal Company should be required to pay any of the expense of clearing the right-of-way. The respondent should recover damages only if such expense was increased by reason of the presence of the petitioner's poles. That is, if it costs more with the poles than without them, it was an element of damage. This is conceded in the instruction which was requested, and as stated, was fully covered by the court. We do not notice the cases cited for the reason that the theory of these cases was followed by the court in its instructions.

IV.

The requested instruction discussed under subdivision 8 (Assignment of Error 9), was fully covered by the instruction as given by the court (Record, p. 109). The jury were told in definite language that the only question for them to consider was the diminution in value of the right-of-way for railroad purposes, and they were earlier told that if they found the damage would not be appreciable they would return a verdict for only nominal damages. There never was any contention made in the trial of the case as to any benefits that might accrue to the Postal Company. The record

will show that the evidence was confined absolutely to the question of depreciation in value of the use with and without the poles.

V.

Under subdivision 9 (Assignment of Error 10) we take it that it is attempted to complain because the court did not call the jury's attention to the stipulations contained in the petition. This assignment is as unmeritorious as those we have already discussed. The court in its instructions, page 102 to page 105, put before the jury all of the stipulations, and advised them that they would go into the decree; and further instructing them on the question of the measure of damage (Record, p. 109), the court stated that the jury in considering that question should take into consideration all of the stipulations contained in the petition.

VI.

Subdivision 10, (Assignment of Error 11), wherein it is claimed that the court erred in telling the jury that he did not want them to understand that he entertained any views on the question of damages. This is so plainly a correct statement to be made by the court as not to merit any discussion.

VII.

Under subdivision 11, reference is made to assignment of error 12, which refers to the giving of what is claimed was the fourth instruction requested by the defendant. These instructions are not printed in the record, but by referring to assignment of error No. 12, we find that it refers to an instruction given by the court, wherein the jury were instructed that there would be nothing in the final decree which would require the Postal Telegraph Company to maintain any part of the right-of-way, *but as far as the public was concerned*, the Railroad Company would be under the same liability to care for, clear and protect the same as if it was not occupied jointly by the Telegraph Company. This certainly is the law, and in view of the statements which were made during the trial of the case, by witnesses for the Postal Company, and the refusal of the petitioner to stipulate that it would assume any liability or would care for any of the right-of-way, it was a proper instruction, although we submit that the error assigned with reference thereto is so indefinite and the discussion so indefinite that upon that ground alone, it would not merit the consideration of this court.

The foregoing are all of the assignments of error with reference to the instructions given and refused which are discussed. We submit that they are all totally without merit, and show the lack of any ground upon which to base a request for a review of this case, which was tried upon a theory of law most favorable to the petitioner.

No complaint is or can be made to the instructions given by the court, and we submit that the requested instructions even if they were properly before the court, so far as pertinent, were fully covered and the case was fairly submitted to the jury from the standpoint of the plaintiff in error. If there was any error in this case it was in refusing the respondent the right to go into matters of damage, which we believe it was entitled to put before the jury. We will say that the return of \$15,000.00 for the perpetual right to maintain telegraph poles on the 120 miles of right-of-way, under stipulations which permit their setting at any point upon that right-of-way, giving an annual return upon a basis of four per cent of \$600 per year or about \$5.00 per mile, amounts to almost the taking of property without any compensation.

We submit that this case was tried before the

jury on the question of damage under rules of law most favorable to the petitioner; that the petitioner put before the jury every matter or thing which was favorable to its contention. The court gave the jury instructions adopting the theory of law urged by the petitioner, having refused to admit evidence upon the theory of respondent, and that the petitioner by reason of the trial before the jury and the verdict returned by it, has no just cause for complaint. It had a fair and impartial trial upon a theory of law proposed by itself, and there is no merit in the errors assigned and argued, and the judgment and decree entered upon the verdict of the jury should be affirmed.

C. H. WINDERS,
Attorney for Defendant in Error.

12
No. 2270

United States
Circuit Court of Appeals
For the Ninth Circuit.

PUGET SOUND MILLS & TIMBER COMPANY, a
Corporation,

Appellant,

vs.

GEORGE W. LOGGIE,

Appellee,

AND

GEORGE W. LOGGIE,

Appellant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY, a
Corporation,

Appellee.

Transcript of Record.

Appeals from the United States District Court for the
Western District of Washington, Northern Division.

FILED

JUL 1 - 1913

No. 2270

United States
Circuit Court of Appeals
For the Ninth Circuit.

PUGET SOUND MILLS & TIMBER COMPANY, a
Corporation,

Appellant,

vs.

GEORGE W. LOGGIE,

Appellee,

AND

GEORGE W. LOGGIE,

Appellant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY, a
Corporation,

Appellee.

Transcript of Record.

Appeals from the United States District Court for the
Western District of Washington, Northern Division.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer.....	19
Appeal (Copy).....	191
Appeal (Original)	199
Assignment of Errors on Appeal of George W. Loggie	130
Assignment of Errors on Appeal of Puget Sound Mills & Timber Co.....	124
Bill of Complaint	2
Bill of Exceptions or Statement of Case	36
Bond on Appeal of George W. Loggie.....	135
Bond on Appeal of Puget Sound Mills & Timber Co.	133
Certificate of Clerk U. S. District Court to Tran- script of Record, etc.....	193
Citation on Appeal of George W. Loggie (Copy)	188
Citation on Appeal of George W. Loggie (Ori- ginal).....	195
Citation on Appeal of Puget Sound Mills & Tim- ber Co. (Copy).....	190
Citation on Appeal of Puget Sound Mills & Tim- ber Co. (Original).....	197
Communication, Dated August 14, 1906, from Examiner to G. W. Loggie.....	151
Communication, Dated September 14, 1906, from Examiner to G. W. Loggie.....	157

ii *Puget Sound Mills & Timber Company*

	Index.	Page
Complainant's Exceptions to Interlocutory Decree		97
Complaint, Bill of		2
DEPOSITIONS ON BEHALF OF COMPLAINANT:		
LAIN, DAVID E.		66
LOGGIE, GEORGE W.		36
PURDY, W. H.		48
SWAN, MARSENA D. (in Rebuttal)....		87
WESTMAN, PETER M.		53
DEPOSITIONS ON BEHALF OF DEFENDANT:		
ALLARD, J. A.		78
BROOKS, STEPHEN A.		89
COBB, CHARLES		86
HILLS, J. D.		84
KELLY, JAMES C.		59
Diagram.....		210
EXHIBITS:		
Complainant's Exhibit "B"—Notice Dated January 23, 1907—George W. Loggie to Puget Sound M. & T. Co.....		144
Exhibit "A" to Bill of Complaint—Letters Patent of G. W. Loggie, No. 837,087—Patented November 27, 1906.....		10
Plaintiff's Exhibit "A"—Drawings and Specifications of Letters Patent No. 837,087, to G. W. Loggie, Patented November 27, 1906		145
Plaintiff's Exhibit "H"—Specification of Invention by George W. Loggie.....		146

Index.

Page

EXHIBITS—Continued:

Defendant's Exhibit No. 1 (Interrogatories and Answers Propounded to Marsena D. Swan, March 7, 1910 at Mount Pleasant, Michigan).....	203
Defendant's Exhibit No. 2 (Photograph) ..	211
Defendant's Exhibit No. 3 (Photograph) ..	213
Defendant's Exhibit No. 4 (Photograph) ..	215
Defendant's Exhibit No. 5 (Photograph) ..	217
Defendant's Exhibit No. 6—Drawings and Specifications of Letters Patent No. 721,006, Dated February 17, 1903, Thomas J. Bray, Jr.....	161
Defendant's Exhibit No. 7—Drawings and Specifications of Letters Patent No. 685,465, Patented October 29, 1901—P. Boyd.....	167
Defendant's Exhibit No. 8—Drawings and Specifications of Letters Patent No. 299,832, Patented June 3, 1884—W. H. Moore	175
Interlocutory Decree	116
Letter Dated August 27, 1906—G. W. Loggie to Commissioner of Patents.....	153
Letter Dated September 22, 1906—G. W. Loggie to Commissioner of Patents.....	159
Letter Dated October 16, 1906—G. W. Loggie to Commissioner of Patents.....	183
Names and Addresses of Counsel.....	1
Opinion	101

Index.	Page
Order Allowing Appeal of Complainant and Fixing Amount of Bond	140
Order Allowing Appeal of Defendant and Fix- ing Amount of Supersedeas Bond.....	138
Order Allowing Complainant's Exceptions to Interlocutory Decree	100
Order Extending Time for Settlement of Bill of Exceptions	31
Order Extending Time to February 27, 1913, to File Bill of Exceptions.....	141
Order Extending Time to March 31, 1913, for Filing of Bill of Exceptions.....	143
Order Extending Time to April 28, 1913, for Filing Record on Appeal.....	201
Order Settling Bill of Exceptions	32
Petition of George W. Loggie for Appeal.....	122
Petition of Puget Sound M. & T. Co. for Appeal.	121
Praecipe for Record on Appeal..	184
Replication	29
Stipulation Concerning Bill of Exceptions, De- murrer, Exceptions to Interlocutory Decree, and Waiving Printing of Certain Exhibits.	34
Stipulation Extending Time for Settlement of Bill of Exceptions or Statement of Case..	30
Supplemental Praecipe for Record on Appeal..	187

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

GEORGE W. LOGGIE,

Complainant and Appellant,

vs.

PUGET SOUND MILLS & TIMBER COM-
PANY, a Corporation,

Defendant and Appellant.

Names and Addresses of Counsel.

C. W. DORR, Esq., Attorney for Complainant and
Appellant,

375 Colman Block, Seattle, Washington.

FRED W. DORR, Esq., Attorney for Complainant
and Appellant,

375 Colman Block, Seattle, Washington.

C. M. HADLEY, Esq., Attorney for Complainant
and Appellant,

375 Colman Block, Seattle, Washington.

J. W. KINDALL, Esq., Attorney for Complainant
and Appellant,

Bellingham, Washington.

J. A. KERR, Esq., Attorney for Defendant and Ap-
pellant,

1309 Hoge Building, Seattle, Washington.

E. S. McCORD, Esq., Attorney for Defendant and
Appellant,

1309 Hoge Building, Seattle, Washington.

[1*]

*Page-number appearing at foot of page of original certified Record.

2 *Puget Sound Mills & Timber Company*

*In the Circuit Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS AND TIMBER COM-
PANY, a Corporation,

Defendant.

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court
of the United States, in and for the Western
District of Washington:

George W. Loggie, a citizen of the United States
and of the State of Washington, residing at Bel-
lingham, Whatcom County, State of Washington,
brings this his Bill of Complaint against Puget
Sound Mill and Timber Company, a corporation,
organized under and pursuant to the laws of the
State of Washington, and having an office and place
for the transaction of its business in said city of
Bellingham, Whatcom County, State of Washing-
ton.

And thereupon your orator complains and says:

I.

That said defendant is, and at all times herein-
after mentioned was, a corporation duly organized
and existing under and by virtue of the laws of the
State of Washington, having one of its places of

business at the city of Bellingham, in said State of Washington, and being at said times and now a citizen of the said State of Washington.

II.

That heretofore and before the 27th day of November, 1906, the said complainant, George W. Loggie, then of said city of Bellingham, county and State aforesaid, was the original and first inventor of certain new and useful improvements in [2] receiving-trips and conveyors, for transmitting pieces of lumber from one machine to another during the process of manufacture, and also for properly depositing said pieces of lumber on said conveyors, the object of which invention is to reduce the amount of floor space required in which to conduct the several processes of manufacture of lumber, to diminish the number of men required to carry forward said work, thereby reducing the expense of manufacturing lumber siding, and correspondingly increasing the profits thereof, all of which is more fully and particularly described in the copy of the letters patent and specifications hereto attached annexed, marked Exhibit "A," and by this reference made a part hereof; that such new and useful improvements were not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his intention or discovery thereof, or more than two years prior to his application for a patent therefor, and not in public use or on sale in this country for more than two years prior to his

application for a patent therefor.

III.

That your orator, so being the inventor of said improvements by having so made said discovery and originated said new and useful improvements within the two years immediately preceding the 16th day of June, 1906, did on said 16th day of June, 1906, make application for a patent therefor to the Commissioner of Patents in the United States Patent Office, in accordance with the then existing laws of the United States, and complied in all respects with the conditions and requirements and conditions of said laws. [3]

IV.

That thereafter on November 27, 1906, letters patent of the United States numbered 837,087, signed, sealed and executed in due form of law, and bearing date the day and year last mentioned, were issued to said George W. Loggie, whereby there was secured to him and to his heirs and assigns for the term of seventeen years from the 27th day of November, 1906, the full and exclusive right of making, using and vending the said improvements embodied in said patent throughout the United States and the Territories thereof, as appears by a copy of said letters patent and specifications thereof hereunto annexed, marked Exhibit "A" and by this reference made a part hereof, and as will more fully appear by a certified copy of said letters patent and specifications thereof, in court to be produced, leave for which your orator hereby asks.

V.

That at all times since complainant's discovery

and invention of his said improvement at the time of the patenting thereof and now complainant has been and is the owner of all rights in and of the whole of said invention and letters patent, and is entitled to be protected in the enjoyment of the same.

VI.

That defendant, as your orator is informed and believes, since a date within the period of two years prior to your orator's application for said letters patent and subsequent to your orator's said invention and discovery, well knowing all the facts hereinbefore set out, and against the will of your orator and in violation of his rights, learning of your orator's said invention and device, and seeking to take advantage [4] of your orator's knowledge, skill and discovery, copied or caused to be copied the experimental and working plan of your orator's and placed the same in use to its own advantage and benefit, at a lumber manufacturing plant owned by it and situated at said city of Bellingham, State of Washington, within said District, and constructed or caused to be constructed and used or caused to be used, receiving-trips and conveyors and machines for the manufacture of lumber, substantially as described in said letters patent, and each of which contains the invention described and claimed in said letters patent, and each of which is and was an infringement thereof; and defendant, well knowing all the facts hereinbefore set out, has continuously since about November, 1906, manufactured large quantities of lumber by a process, machines and

combinations of machines using, containing, and embracing said inventions, all without the license or consent of complainant and against his will, and in violation of his rights, and in infringement of said patent, and the rights secured thereby to complainant, with full knowledge of those rights, and to the injury of this complainant whereby he has been and still is being deprived of profits which he otherwise would have obtained, and whereby he has been and is being deprived of the exclusive enjoyment of the use, making and vending of said patented invention; that defendant is now infringing said patent and rights secured thereby and is continuing to use receiving-trips, conveyors and machines substantially as described in said patent and specifications thereof, and is continuing to manufacture lumber as aforesaid and by the use of said invention, to the infringement of said patent, and threatens to continue doing so, all in violation of the rights of complainant [5] as secured to him by said letters patent and without your orator's consent and against his will, all of which acts and doings are contrary to equity and good conscience, and tend to the manifest injury of your orator in the premises.

VII.

That defendant, so infringing said letters patent and using and operating machines and contrivances containing and embracing complainant's said invention and patent, has at all times during the period of such use, operation and manufacture effected a great saving in the cost of manufacture of lumber thereby, and has made great profits by such

use, operation and manufacture, the full and exact amount of which is at this time unknown to your orator.

VIII.

That but for the infringement herein complained of, and others of like character, your orator would still be in the undisturbed condition, use and enjoyment of the exclusive privilege secured by the said letters patent, and in receipt of the profits of the same.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end, therefore, that the defendant may, if it can, show why your orator should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of its and its agents' and officers' knowledge, remembrance, information and belief, full, thorough, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived:

And that the defendant may be decreed to account for [6] and pay over the income or profits thus unlawfully derived from the violation of your orator's rights, and be restrained from any further violation of said rights:

Your orator prays that this Court may grant a writ of injunction, issuing out of and under seal of this Honorable Court, perpetually enjoining and restraining said defendant, its clerks, attorneys, agents, officers, servants or workmen from any fur-

8 *Puget Sound Mills & Timber Company*

ther construction, sale or use in any manner of said patent improvement, or any part thereof, in violation of your orator's rights aforesaid, and that the material now in possession or use of the said defendant may be destroyed or delivered up to your orator for that purpose.

And that your Honors, upon the rendering of the decree above prayed, may assess or cause to be assessed, in addition to the profits to be accounted for as aforesaid, the damages your orator has sustained by reason of such infringement, and that your Honor may increase the actual damages so assessed to a sum equal to three times the amount of such assessment under the circumstances of the wilful and unjust infringement by said defendant as herein set forth.

And your orator further prays that a provisional or preliminary injunction be issued restraining said defendant from any further infringement of said letters patent pending this cause, and for such other and further relief as the equity of the case may require, and to your Honors may seem meet.

May it please your Honors to grant unto your orator, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the said Puget Sound Mills and Timber Company, a corporation, commanding it to appear and answer unto [7] this Bill of Complaint, and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of

equity and good conscience.

GEORGE W. LOGGIE,

By FAIRCHILD & BRUCE,

Solicitors.

H. A. FAIRCHILD,

S. M. BRUCE,

J. W. KINDALL,

Solicitors for Complainant and *for* Counsel.

United States of America,

Southern District of California,—ss.

On this — day of December, 1907, before me, the undersigned notary public, personally appeared George W. Loggie, the complainant above named, who, being first duly sworn by me, deposes and says: That he is complainant named in the foregoing entitled cause of action, that he has read the foregoing bill of complaint, knows the contents thereof, and that the same are true of his own knowledge, except as to the matters stated therein on information and belief, and as to those matters he believes the same to be true.

GEORGE W. LOGGIE.

Subscribed and sworn to before me this 16th day of December, A. D. 1907.

[Seal]

FRANK R. McREYNOLD,

Notary Public in and for the State of California,

Residing at Los Angeles County. [8]

Exhibit "A" [to Bill of Complaint—Letters Patent of G. W. Loggie, No. 837,087—Patented November 27, 1906].

No. 837,087.

THE UNITED STATES OF AMERICA.

TO ALL TO WHOM THESE PRESENTS
SHALL COME:

Whereas George W. Loggie, of Bellingham, Washington, has presented to the Commissioner of Patents a Petition praying for the grant of Letters Patent for an alleged new and useful improvement in Receiving-Trips and Conveyors, a description of which invention is contained in the specification of which a copy is hereunto annexed and made part hereof and has complied with the various requirements of law in such cases made and provided; and

Whereas, upon due examination made the said claimant is adjudged to be justly entitled to a Patent under the law.

Now, therefore, these Letters Patent are to grant unto the said George W. Loggie, his heirs, or assigns for the term of seventeen years from the twenty-seventh day of November one thousand nine hundred and six the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this twenty-seventh day of November, in the year of our Lord one thousand

nine hundred and six, and of the Independence of the United States of America the one hundred and thirty-first.

F. I. ALLEN,

Commissioner of Patents.

(Seal of Patent Office, U. S. A.) [9]

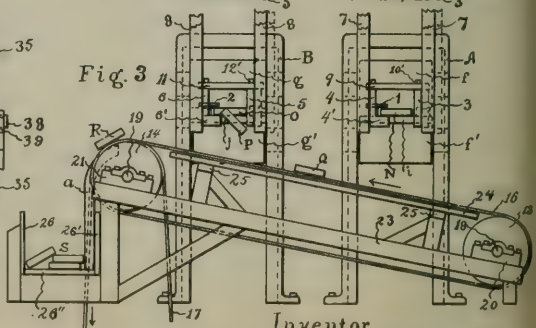
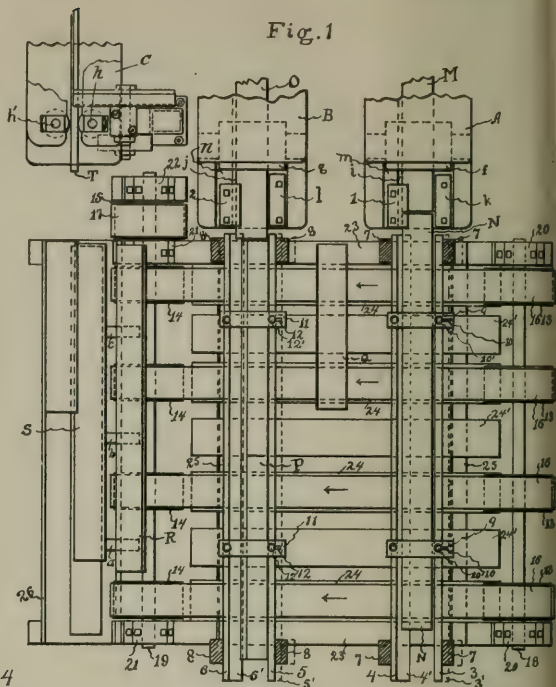
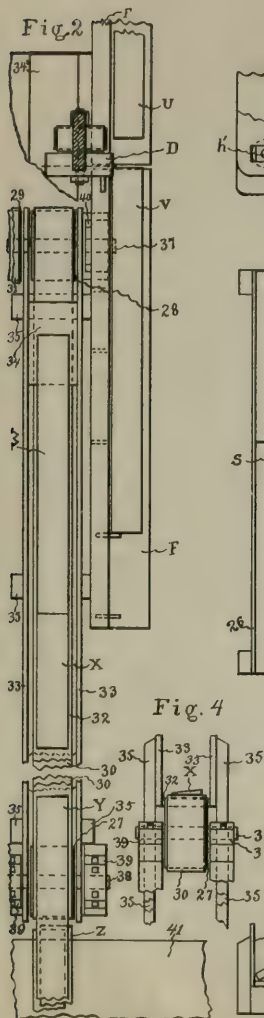
No. 837,087.

PATENTED NOV. 27, 1906.

G. W. LOGGIE.
RECEIVING TRIP AND CONVEYER.

APPLICATION FILED JUNE 16, 1906.

2 SHEETS—SHEET 1.

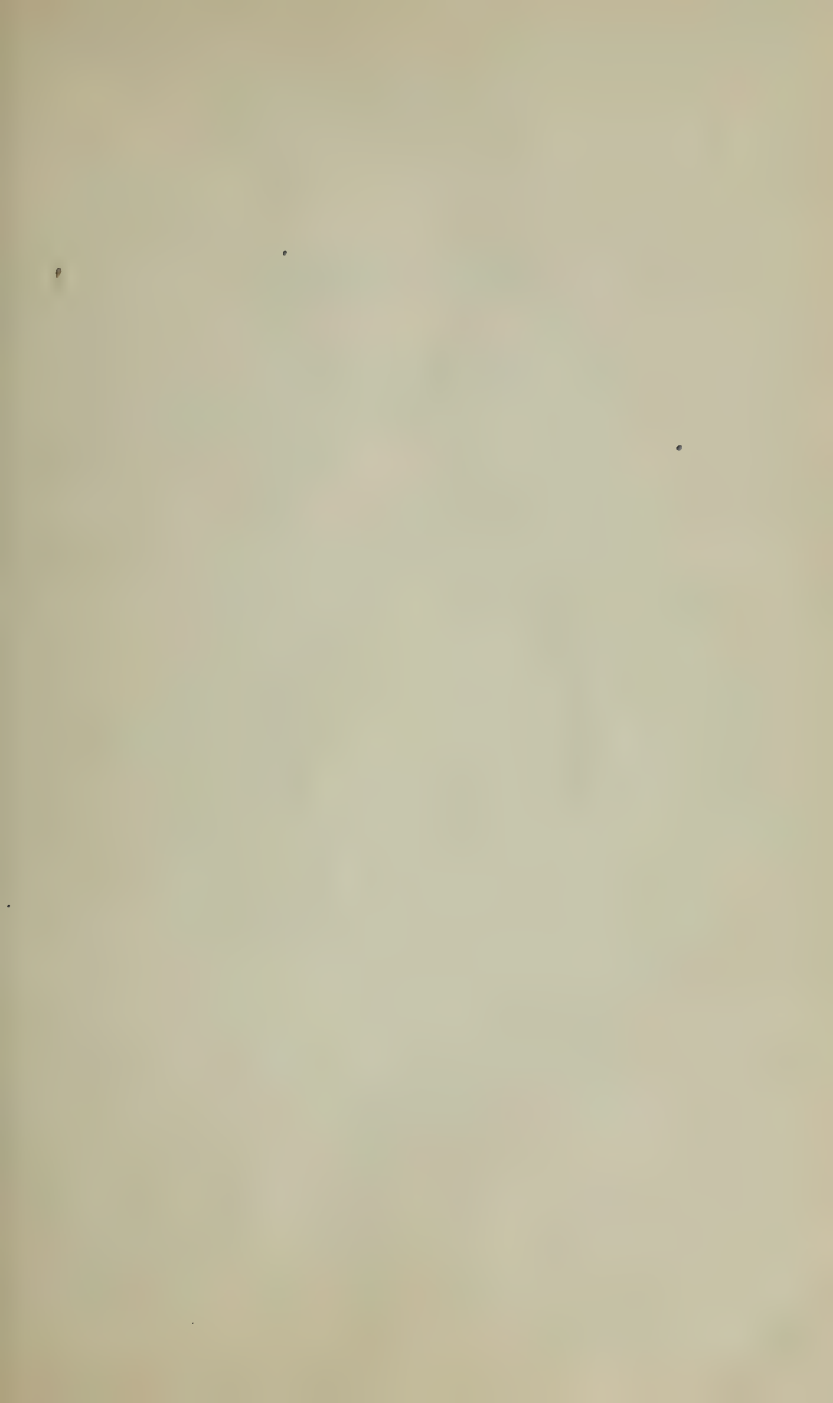


Witnesses

E. G. Burleigh.
A. W. Young.

Inventor

George W. Loggie
By his Attorney
David E. Lain

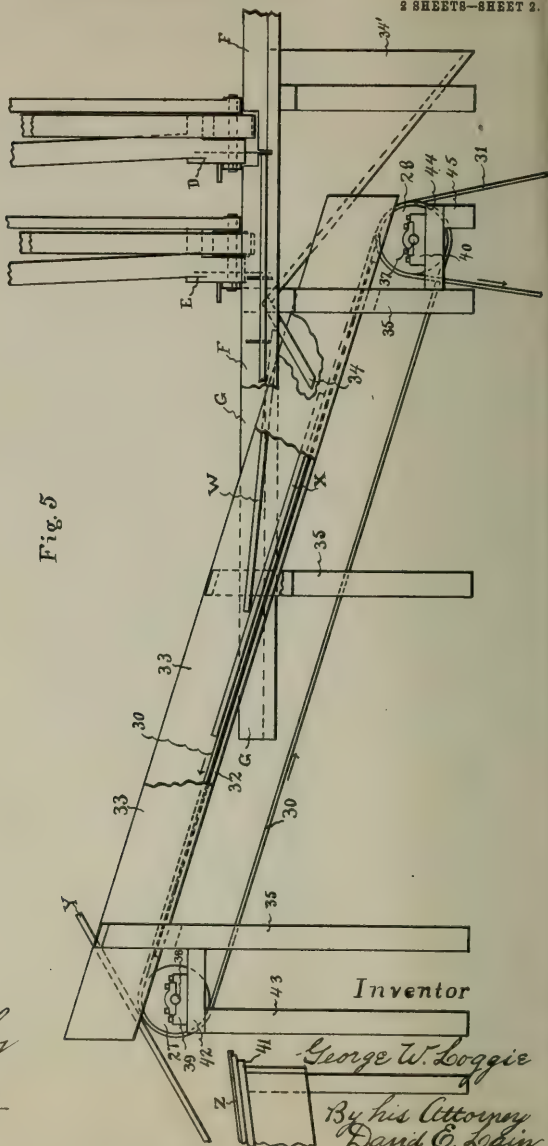


G. W. LOGGIE.
RECEIVING TRIP AND CONVEYER.

APPLICATION FILED JUNE 18, 1906.

2 SHEETS—SHEET 2.

Fig. 5



Witnesses

E. G. Girdingley
J. W. Loggie

Inventor

George W. Loggie

By his Attorney
David C. Lakin

UNITED STATES PATENT OFFICE.

GEORGE W. LOGGIE, OF BELLINGHAM, WASHINGTON.

RECEIVING-TRIP AND CONVEYER.

No. 837,087.

Specification of Letters Patent.

Patented Nov. 27, 1906.

Application filed June 16, 1906. Serial No. 322,112.

To all whom it may concern:

Be it known that I, GEORGE W. LOGGIE, a citizen of the United States, and a resident of Bellingham, in the county of Whatcom and State of Washington, have invented certain new and useful Improvements in Receiving-Trips and Conveyers, of which the following is a specification.

My invention relates to an improvement in conveyers for transmitting pieces of lumber from one machine to another during the process of manufacture and also to an improved receiving-trip by which said pieces of lumber may be properly deposited on said conveyers.

The object of my invention is threefold: to reduce the amount of floor-space required in which to conduct the several processes of manufacture, to diminish the number of machines required for said processes, and to diminish the number of men required to carry forward said work.

The application of my invention to the manufacture of bevel-siding is illustrated in the accompanying two sheets of drawings, in which similar characters refer to similar parts throughout the several views.

Figures 1 and 2, taken together, represent in plan view an arrangement of machines embodying my invention. Fig. 3 is a side elevation of Fig. 1. Fig. 4 is an end elevation of Fig. 2, and Fig. 5 is a side elevation of Fig. 2.

In Figs. 1 and 3, A and B are portions of the rear ends of two wood-planers. Projecting longitudinally from the rear of each of these planers is a receiving-trip which receives each finished board as it comes from the planer and retains it until it has passed entirely beyond the planer bed-plate, when it is allowed to drop. Beneath these trips are a number of pulleys, which move a series of belts transversely behind the planers, forming a lateral conveyer. On this conveyer the boards fall from the trips and are transferred by it to a receptacle lying parallel with, to the rear, and to one side of said planers. By the side of said planers and in line with said receptacle is the resaw C, only the front part of which is shown. The boards are taken from said receptacle and fed by hand through this resaw, and the beveled pieces produced by it are then transferred laterally by hand to the trimmer tables F and G, Figs. 2 and 5. (Trimmer-table G is not shown in Fig. 2.) The trimmer-

and parallel with the planers referred to. Between and above said trimmer-tables are hung the trimmers D and E, Figs. 2 and 5. (Trimmer E is not shown in Fig. 2.) Located between these trimmer-tables F and G is a longitudinal conveyer onto which the strips are thrown by hand after they are trimmed. This conveyer takes them to the grading-table 41, Figs. 2 and 5, all of which will now be more particularly described.

Planers A and B, as illustrated, are alike. In planer A f and f' are the upper and lower rear end rollers. i is the floor of the bed-plate. m is a fixed guide on the left-hand side, and k is a removable guide on the right-hand side, while l is a removable guide fastened on top of guide m and projecting a short distance over the floor i . Through the way limited by said floor i , side guides m and k , and top guides l the board M is driven by rollers f and f' . Registering with the bottom and sides of this way is a receiving-trip composed of side guides 3 and 4, ledge 4', spreaders 9 9, with slotted holes 10 10, and supporting-hangers 7 7 7 7. Hangers 7 7 supporting side guide 4 are rigidly attached to beams overhead, which are not shown. Hangers 7, 7 supporting side guide 3 are also attached to beams overhead, which are not shown. The upper ends of these latter hangers, however, are hung on pins in said beams in line with each other and parallel to said guide, forming a hinged attachment which permits the lower end of these supports to swing when it is desired to change the space between guides 3 and 4. The board N is shown retained in this receiving-trip with one end still resting on the planer-floor i . It may be noted that while the board N is in the illustrated position it is retained by the side guides 3 and 4 and supported by the ledge 4' and planer-bed i ; but since the ledge 4' only furnishes a support for one edge of the board the guide l is required to prevent the board from turning in the receiver as soon as it has passed from between the rollers.

The receiving-trip in the rear of planer B is in all respects similar to the one above described. In planer B the board O between the rear end rollers g and g' has pushed the board P off of the planer-bed j , and it is now entirely within the receiving-trip; but since the ledge 4' only supports the board P under one edge it falls from said trip. However, since the guides and ledge of the receiving-

trip are parallel to the planer-guides and bed the board falls from a position in a right line with that in which it moved through the planer.

5 The lateral conveyer beneath the trips and behind the planers above described is composed of the horizontal shafts 18 and 19, retained in bearings 20 20 and 21 21 22, respectively. Bearings 20 21 are attached to beams 23 23, and said beams are supported by suitable standards. Said bearings 20 20 and 21 21 are retained in such position that the shafts are parallel with the guides of said trip and shaft 19 preferably higher than shaft 18. On shaft 18 are the fixed pulleys 13 13 13 13, and on shaft 19 are the fixed pulleys 14 14 14 14, the pulleys on each shaft being regularly spaced and paired with those on the other shaft. Belts 16 16 16 16 are carried by the several pairs of pulleys. On one end of shaft 19 is fastened the driver-pulley 15, on which runs the driver-belt 17. This end of shaft 19 rests in bearing 22, which is suitably secured to a support. The belts 16 16 16 16 are supported between the pulleys by the under boards 24 24 24 24. These under boards are secured to the framework 25 25. The slats 24' 24' 24' are situated between the several belts and are also attached to the framework 25 25. At the right-hand end of this lateral conveyer is the receptacle 26 26' 26". This receptacle may be as shown or only a platform or merely a space at the delivery end of the conveyer, where a number of boards may accumulate. The guards *a b c* are fastened to the side 26" of said receptacle and prevent an accumulation of boards in said receptacle from chafing said belts. The conveyer-belts 16 16 16 16 are driven in the direction as indicated by the arrows. Boards *Q* and *R* are shown on this conveyer. They are assumed to have dropped from the said trips. A pile of boards *S*, occupying a place in the receptacle 26, are assumed to have been dropped there by said conveyer. It may be noted that said boards, whether on said conveyer or in said receptacle, are bound to register approximately with each other at the ends nearest said planers.

5 The resaw *C* is in file line with planers *A* and *B* and opposite the end of receptacle 26. Only the front feed-rollers and a portion of the front end of this machine are shown. Board *T* is shown between vertical feed-rollers *h* and *h'*. In passing through the resaw the finished boards are each cut into two pieces of beveled siding, as is well understood by those familiar with these processes. From said resaw the beveled siding is transferred laterally by hand to trimming-tables *F* or *G*, Figs. 2 and 5. These trimmer-tables are located in file line and parallel with said planers and resaw. Trimmers *D* and *E* (partly illustrated in Figs. 2 and 5) are sup-

ported overhead and hang over and between said trimmer-tables in file line with said planers and resaw. These trimmers are hung on in advance of the other, so that they may not collide when in operation. Trimmer *D* serves table *F*, and trimmer *E* serves table *G*. Table *F* is partly removed in order to show articles behind it. Between trimmer-tables *F* and *G* and parallel with the same is a longitudinal conveyer. This device has a conveyer-belt 30 running in the direction indicated by the arrows on pulleys 28 and 27. Pulley 28 is attached to horizontal shaft 37, which is supported by bearings 40 40, (one of which is not shown.) These bearings are attached to and supported on suitable framework 44 45. Pulley 27 is fixed to horizontal shaft 38, which is supported in bearings 29 29, attached to framework 42 43. Shaft 38 is parallel with and preferably in a higher plane than shaft 37. One end of shaft 37 carries driver-pulley 29, which is driven by belt 31. Conveyer-belt 30 is supported by under board 32, to which is attached deep side guides 33 33, which are attached to standards 35 35 35, &c. One of said side guides is partly removed in Fig. 5, and a section of this conveyer is removed in Fig. 2 for lack of space. At the lower or receiving end of this longitudinal conveyer is an inclined apron 34, the lower end of which is fastened between guides 33 33 and the upper end supported on the frame of the trimmer-tables. 34' is a dust-screen which prevents the trimmings from falling on the conveyer. A grading-table 41 (only partly shown) is located under the delivery end of the longitudinal conveyer. This table is slightly inclined downward from the side nearest said conveyer. After the strips of beveled siding are suitably trimmed by said trimmers while on said trimmer-tables they are taken from thence and thrown by hand on said longitudinal conveyer, care being taken, however, to so throw them that one end may strike on said apron 34 and the other end on said belt 30. These strips are frail and can be easily split by rough handling; but when they land in the conveyer, as described, the flexibility of the pieces causes them to bend downward, while the ends are supported between the said apron and said belt. They are thus saved from destructive shock. The strip *W* is assumed to have been thrown on the conveyer in this manner. The friction between the end of the strip on the belt and on strips of siding being carried by the belt is greater than the friction between the end of the strip and the inclined apron 34. Hence the strips are drawn down and forward until they lie entirely on the belt, as illustrated by the position of the strip *X*. The strip *Y* is shown as passing from the delivery end of the conveyer onto the grading-table 41, where a pile

of other strips Z have been assumed to have already arrived. It will be noted that the strips of siding are deposited on the grading-table with the ends nearest the conveyer lying in approximate register.

In practice I use more planers to finish the boards for delivery to the lateral conveyer than those herein illustrated and described. The other machines can also be increased in number or changed in kind as the needs of the several processes may require. The belts and other described appliances are well suited to the uses of a beveled-siding mill. However, for other uses to which my invention is also applicable chain or rope conveyers or some other variation of these appliances as described may be desirable. In many details also the apparatus as described can be changed to advantage to meet other conditions or even serve the described conditions better—as, for instance, the guides 1 and 2 on the planer bed-plates may be replaced by rollers. Therefore I do not desire to be understood as limiting myself to the specific forms and uses herein described.

With my improved apparatus the floor-space required on which to conduct the several processes necessary in finishing lumber is in the form of a rectangle measured as follows: in length by the length of the rough material when fed into the planers, plus the length of the planers, plus the length of the pieces as they lie on the lateral conveyer, and plus the length of the trimmed pieces as they lie on the grading-table, and in width by the distance required to properly set up and operate the file of planers, resaw-trimmers, and such other machinery as may be required.

As compared to the way the manufacture of bevel-siding is ordinarily carried on, my described process saves the services of one man to take the stuff from each planer. It also saves the use of one additional trimming-machine with attendant, for in practice I use two trimmers and one single and one double planer. The longitudinal conveyer also saves the use of one or more men. In this class of work pieces of material of widely-varying length are used. With my improved apparatus, as already referred to, these pieces are deposited by the conveyers with the ends nearest the next machine in order approximately registering, which is of great importance for the rapid and proper handling of the stuff.

Having thus particularly described my improvements, what I claim as new, and desire to secure by Letters Patent, is

1. The combination of a battery of planers or similar wood-finishing machines; a receiving-trip extending longitudinally from the rear of each of said planers, said trips so constructed and placed that they will retain the stuff as it comes from the planers, in substantially the same plane as it passed through

the said planers, until it has passed entirely out of the same; and a lateral conveyer at the rear of said battery of planers and beneath said trips.

2. The combination of a battery of planers or similar woodworking-machines; a receiving-trip extending longitudinally from the rear of each machine, said trips so constructed and placed that they may retain the stuff as it comes from the planers in substantially the same plane as it passes through said machines until it has passed entirely out of the same; a lateral conveyer at the rear of said battery of machines and beneath said trips; and a receptacle at the delivery end of said conveyer.

3. The combination of a battery of planers or similar woodworking-machines; a receiving-trip extending longitudinally from the rear of each of said machines; a lateral conveyer located at the rear of said machines and beneath said trips; a receptacle at the delivery end of said conveyer; and a machine to complete the second stage in the process of manufacture, said machine located near one end of said receptacle, and preferably in file line with said battery of planers.

4. The combination of a battery of planers or similar woodworking-machines; a receiving-trip extending longitudinally from the rear of each of said machines; a lateral conveyer located at the rear of said machines and beneath said trips; a receptacle at the delivery end of said conveyer; a machine, or machines, to complete the second stage in the process of manufacture, located near one end of said receptacle, and preferably in file line with said battery of planers; and a machine, or machines, to complete the third stage in the process of manufacture located by the side of the last-mentioned machines, and in file line with said battery of planers.

5. The combination of a battery of planers or similar woodworking-machines; a receiving-trip extending longitudinally from the rear of each of said machines; a lateral conveyer located at the rear of said machines and beneath said trips; a receptacle at the delivery end of said conveyer; a machine, or machines to complete the second stage in the process of manufacture located near one end of said receptacle and in file line with said battery of planers; a machine, or machines, to complete the third stage in the process of manufacture located by the side of said last-named machines and in file line with said battery of planers; and a longitudinal conveyer the receiving end of which is located alongside of and below said last-mentioned machine, or between said last-mentioned machines, and the delivery end of which is located above a table.

6. The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood-planer, the bed

of which planer has a channel composed of a bottom and side guides; the receiving-trip comprising a top guide attached to one of said planer-bed, side guides and extending over said channel-bottom; two deep, side guides registering with the side guides on said planer-bed; and a narrow, bottom guide or ledge attached to one of said deep side guides and registering with said channel-bottom.

7. The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood-planer, the bed of which planer has a channel composed of a bottom and two side guides; the receiving-trip comprising a top guide attached to one of said planer-bed, side guides and extending over said channel-bottom; two deep, side guides registering with the side guides on said planer-bed; a narrow, bottom guide or ledge attached to one of said side guides and registering with said channel-bottom; slotted spreaders attached to said deep, side guides; and supporting-hangers also attached to said deep, side guides.

8. The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood-planer, the bed of which planer has a channel composed of a bottom and two side guides; the receiving-trip comprising a top guide attached to one of said planer-bed, side guides and extending over said channel-bottom; two deep, side guides registering with the side guides on said planer-bed; a narrow bottom guide or ledge attached to one of said side guides and registering with said channel-bottom; slotted spreaders attached to said deep side guides; and supporting-hangers also attached to said deep side guides, one set of said hangers is attached overhead in a hinge-joint parallel with said guides and the other set is rigidly attached overhead.

Signed at Bellingham, in the county of Whatcom and State of Washington, this 31st day of May, A. D. 1906.

GEORGE W. LOGGIE.

Witnesses:

E. G. CORDINGLEY,

J. A. LOGGIE.

[Endorsed]: Plaintiff's Exhibit "A."

[Endorsed]: Bill of Complaint. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jan. 18, 1908. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep. [14]

*In the Circuit Court of the United States for the
Western District of Washington, Northern Division.*

No. 1640.

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Answer.

This defendant now and at all times hereinafter saving and reserving unto itself all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, imperfections and insufficiencies of the bill of complaint, for answer thereunto, or so much thereof as this defendant is advised is material or necessary to make answer unto, says:

I.

Answering the first paragraph of said bill of complaint, this defendant admits the same.

II.

Answering the second paragraph of said bill of complaint, this defendant denies that on or before the 27th day of November, 1906, or at any other time,

the said complainant, George W. Loggie, was the original or first inventor of the said alleged improvements in receiving-trips and conveyors for transmitting pieces of lumber from one machine to another during the process of manufacture and for properly depositing said pieces of lumber on said conveyors; denies that he was the original or first inventor of the improvements alleged in said paragraph two; denies that said alleged improvements in said paragraph two stated had not been known or used in this country and elsewhere prior to the date of the alleged invention [15] or discovery by the complainant; denies that said alleged improvements were not patented or described in any printed publication in this or any foreign country before complainant's alleged invention or discovery thereof; denies that said alleged improvements were not in public use nor on sale in this country for more than two years prior to said complainant's application for letters patent therefor.

As to whether said alleged improvements are fully and particularly described in the copy of the letters patent and the specifications thereto annexed, attached to the bill of complaint, this defendant is not informed, save by said bill of complaint, and therefore denies the same and leaves the complainant to make proof thereof.

III.

Answering the third paragraph of said bill of complaint, this defendant denies that the complainant was the inventor of said alleged improvements; denies that he made discovery of or originated the said

improvements within two years immediately preceding the 16th day of June, or at all.

As to whether said complainant made application for a patent for said alleged improvements to the Commissioner of Patents, in accordance with the then existing laws of the United States, and complied in all respects with the requirements and conditions of said laws, this defendant is not informed, save by the said bill of complaint and therefore denies the same, and leaves the complainant to make proof thereof.

IV.

Answering the fourth paragraph of said bill of complaint, this defendant denies that on the 27th day of November, 1906, or at any other time, letters patent of the United States [16] numbered 837,087 were signed, sealed and executed in due form of law and issued to said George W. Loggie, whereby there was secured to him and to his heirs and assigns for seventeen years from the 27th day of November, 1906, the full and exclusive right of making, using and vending the said improvements embodied in said patent throughout the United States and the territories thereof, as alleged in said bill of complaint; and as to all of these matters and all other matters alleged in this bill of complaint, this defendant denies the same and leaves the complainant to make such proof as he may be advised is proper and material.

V.

Answering the fifth paragraph of the complaint, this defendant denies that the complainant has been or is the owner of any rights in or to the said alleged

22 *Puget Sound Mills & Timber Company*

invention and said letters patent; denies that he is to be protected in the enjoyment of the same; denies the existence of the legal effect of said letters patent, and denies the right of the complainant to maintain this suit by virtue of said letters patent and by virtue of any alleged discovery or invention prior to the application for said letters patent; denies the alleged invention set forth in said letters patent and each and every part thereof; and denies that any rights or privileges were granted or secured, or intended to be granted or secured, thereby to the complainant, and leaves the complainant to make proof thereof.

VI.

Answering the sixth paragraph of said bill of complaint, this defendant denies that within two years prior to complainant's application for letters patent, or at any other [17] time, either before or subsequent to the date of complainant's alleged invention and discovery, this defendant copied or caused to be copied, the experimental or working plans of the complainant; denies that defendant placed the same in use in its lumber manufacturing plant at Bellingham, Washington, or at any other place; denies that it constructed or caused to be constructed, or used or caused to be used receiving-trips or conveyors or machines for the manufacture of lumber substantially as described in said letters patent; denies that it ever used or caused to be used any improvements or inventions as alleged or claimed in said paragraph, or in said letters patent, or at all; denies that the use of any machinery, receiving-trips or conveyors or machines used by this defendant in the manufac-

ture of lumber at Bellingham, Washington, or elsewhere, is or was an infringement of any rights of the complainant; denies that it has continuously or at all since November, 1906, manufactured lumber by any process of machines or combination of machines using, containing or embracing any inventions of complainant, as alleged in said bill of complaint; denies that defendant has violated any of the rights of the complainant, and denies any infringement by the defendant of said alleged letters patent or of any rights secured thereby to the complainant; denies that complainant has been or is being deprived of any profits which he would otherwise have obtained by any acts of this defendant; denies that the complainant has been or is being deprived of the exclusive enjoyment of the use, making or vending said alleged patented invention; denies that the defendant is now or ever has infringed the said alleged patent or any rights secured thereby to the complainant; denies that defendant is continuing to use [18] receiving-trips, conveyors and machines substantially as described in said patent and the specifications thereof; denies that the defendant is continuing to manufacture lumber by the use of said alleged invention of the complainant to the infringement of said patent or at all; denies that he is violating or has violated any of the rights of the complainant as secured to him by said alleged letters patent; denies that any acts and doings of the defendant are contrary to equity and good conscience, and denies that any acts or doings of the defendant tend to the injury of complainant, and leaves the complainant to his proofs.

VII.

Answering the seventh paragraph of said bill of complaint, this defendant denies that it has infringed said letters patent in any way at all; denies that it has used or operated machines or contrivances containing or embracing complainant's alleged invention and patent; denies that in the use and operation of any machines or contrivances used in its plant at Bellingham for the manufacture of lumber it has effected any saving in the cost of the manufacture of lumber; denies that it has made large profits by the use or operation of any machines or contrivances that in any manner infringe upon the rights or privileges secured to the complainant by his alleged patent.

VIII.

Answering the eighth paragraph of said bill of complaint this defendant denies the same and each and every part thereof.

IX.

This defendant further answering said bill of complaint [19] avers, on information and belief, that the said complainant is not the true, original, first and sole inventor of the alleged invention shown, described and claimed in said letters patent numbered 837,087, but that the same and all material parts thereof were, long prior to the date of the alleged invention of said complainant, patented to other persons, and described in the following mentioned letters patent and printed publications:

LETTERS PATENT OF THE UNITED
STATES.

No. 685,467—P. Boyd, October 28, 1901.

No. 299,832—W. H. Moore, June 3, 1884.

No. 721,006—T. J. Bray, Jr., February 17, 1903.
and others to this defendant at present unknown, but
which it prays leave of Court to insert by amend-
ments when ascertained.

PRINTED PUBLICATIONS.

The printed copies of the aforesaid letters patent
of the United States published by the Patent Office
of the United States in the city of Washington, Dis-
trict of Columbia, on the dates corresponding with
the dates of the several letters patent of the United
States respectively.

X.

This defendant, further answering, says: That let-
ters patent No. 837,087 are void and of no force and
effect, because the alleged improvements attempted
to be patented thereby did not, at the date of said
letters patent or at the date of said alleged inven-
tion thereof by said complainant, involve or require
invention, and in view of the state of the art as it
existed at that time did not require the exercise of
the inventive faculty to devise and produce the al-
leged invention shown, described and claimed in said
letters patent; that said alleged invention produced
no new and useful result not already [20] known
to others skilled in the art to which said alleged in-
vention relates.

XI.

This defendant, further answering, says: That the

invention claimed in said letters patent was not an invention and is not an invention, but merely the product of mechanical skill.

XII.

This defendant, further answering says: That the patent is invalid because the matter claimed or substantial parts thereof were not novel at the time of application, but were known to the public and were in general use long prior to the alleged discovery and invention by the complainant.

XIII.

That said letters patent are invalid and void for the reason that the description of the invention is not in such full, clear, concise, and exact terms as to enable one skilled in the art to make and use the invention; and that said patent is invalid because the claims are not distinct and are not based on the specifications relating to said claims, and the application for patent does not describe the object of complainant's alleged invention as actually patented.

XIV.

Further answering the bill of complaint, defendant avers that the machines, contrivances, conveyors and trips used by it in the manufacture of lumber at its plant at Bellingham, Washington, were constructed, utilized and in actual operation by the defendant long prior to the alleged invention of the complainant and more than two years prior to the date of the filing of his application, and that the same contrivances, [21] trips, and machines, and assembling of machines had been in operation and

use continuously in the State of Washington and elsewhere for many years prior to the date of complainant's application for letters patent, and had been in constant use and operation for more than twenty years prior to the application of complainant for letters patent, and that the machines, contrivances, conveyors and trips used by the defendant are entirely and radically distinct and different from the machines and alleged inventions of the complainant.

Now, therefore, this defendant, having fully answered all and singular those portions of the bill of complaint which it is advised it is material and necessary for it to answer, denies all manner of things specifically answered unto and prays the same benefit of the several matters and things hereinbefore alleged and set forth as if by reason thereof they had demurred or pleaded to said bill; all of which foregoing statements and defenses this defendant is ready and willing to aver and maintain and prove as this Honorable Court shall direct; and without admitting as true any of the matters charged and alleged in said bill of complaint not herein well and sufficiently answered, confessed, traversed and avoided or denied, and submitting to this Honorable Court that the complainant has no right to any further answer to said bill of complaint than is hereinbefore contained, and no right to any accounting, discovery, injunction or other relief, prayed for in said bill of complaint, this defendant prays to be dismissed

28 *Puget Sound Mills & Timber Company*

hence with its reasonable costs in this behalf most wrongfully sustained.

KERR & McCORD,
Solicitors for Defendant. [22]

State of Washington,
County of King,—ss.

J. A. Kerr, being first duly sworn, upon oath deposes and says, that he is a member of the firm of Kerr & McCord, solicitors for the defendant in the above-entitled action; that the officers of this defendant are absent from King County, and that he makes this verification for and on behalf of said defendant; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

J. A. KERR.

Subscribed and sworn to before me this the 24th day of May, A. D. 1909.

[Seal] W. D. COVINGTON,
Deputy Clerk U. S. Circuit Court, Western District
of Washington.

[Endorsed]: Answer. Filed U. S. Circuit Court,
Western District of Washington. May 24, 1909.
A. Reeves Ayres, Clerk. W. D. Covington, Deputy.
[23]

*In the Circuit Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS AND TIMBER COM-
PANY, a Corporation,

Defendant.

Replication.

This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto saith, that he doth and will aver, maintain, and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of said defendant, is very uncertain, evasive, and insufficient in law, to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied to, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this Honorable Court

30 *Puget Sound Mills & Timber Company*

shall direct, and humbly prays as in and by his said bill he hath already prayed.

S. M. BRUCE,

J. W. KINDALL,

Solicitors and Counsel for Repliant.

[Endorsed]: Replication. Filed May 20, 1909.
A. Reeves Ayres, Clerk. By E. D. Kenyon, Deputy.
[24]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Plaintiff,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

**Stipulation [Extending Time for Settlement of Bill
of Exceptions or Statement of Case].**

IT IS HEREBY STIPULATED AND
AGREED by and between the parties hereto that the
time within which the Bill of Exceptions or State-
ment of case may be settled shall be extended up to
and including the 21st day of April, 1913.

DORR & HADLEY and

J. W. KINDALL,

Attorneys for Plaintiff.

KERR & McCORD,

Attorneys for Defendant.

[Endorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington. Apr. 16, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [25]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Plaintiff,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

**Order [Extending Time for Settlement of Bill of
Exceptions].**

It appearing to the Court that a stipulation has been entered into by the parties to the above-entitled cause extending the time to settle the Bill of Exceptions or Statement of Case up to and including April 21st, 1913, it is now by the Court,

ORDERED, that the time within which the Statement of Case or Bill of Exceptions may be settled in the above-entitled cause be and the same is hereby

32 *Puget Sound Mills & Timber Company*

extended up to and including the 21st day of April, 1913.

Done in open court this 16th day of April, 1913.

EDWARD E. CUSHMAN,

Judge.

O. K.

KERR & McCORD,

Attys. for Deft.

DORR & HADLEY and

J. W. KINDALL.

[Endorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington. Apr. 16, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [26]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Plaintiff,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Order Settling Bill of Exceptions.

This cause having been brought on regularly before this court on the 16th day of April, 1913, upon the joint application of the plaintiff and the defend-

ant above named for the settling and certifying of their Bill of Exceptions or Statement of Case lately filed herein, and the time for such settling and certifying of said Bill of Exceptions or Statement of Case having been duly extended by order of the Court and by stipulation of the parties until and including this day, and the parties having agreed together in respect to all of the material facts which should be contained in the said Bill of Exceptions or Statement of Case,—

NOW, THEREFORE, on the joint motion of the parties hereto, it is ordered that the said Bill of Exceptions or Statement of Case, in this cause as the same now stands, be and it is hereby settled as a true Bill of Exceptions or Statement of Case in this cause, and that the same as so settled be now and here certified accordingly by the undersigned Judge of this Court, and that the said Bill of Exceptions or Statement of Case when so certified be filed with the clerk. [27]

It is further ordered that the originals of the exhibits referred to herein may be forwarded to the said Circuit Court of Appeals.

Done in open court this 16th day of April, 1913.

EDWARD E. CUSHMAN,

Judge.

O. K.

DORR & HADLEY,

J. W. KINDALL.

O. K.

KERR & McCORD.

34 *Puget Sound Mills & Timber Company*

[Endorsed]: Order Settling Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington. Apr. 16, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [28]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Stipulation [Concerning Bill of Exceptions, Demurrer, Exceptions to Interlocutory Decree, and Waiving Printing of Certain Exhibits].

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the hereunto attached Bill of Exceptions or Statement of the Case contains all of the facts considered by the said parties to be material to the matters and things involved in the respective appeals of the above-entitled cause to the Circuit Court of Appeals, and that the same may be settled, by an order of the Court, as such.

It is further stipulated and agreed that a demurrer was interposed by the defendant to the complaint of the plaintiff herein, and that the same was over-

ruled, and that the ground of said demurrer was that the said complaint did not state facts sufficient to constitute a cause of action.

It is further stipulated and agreed that at the time the interlocutory decree was made and entered herein that the respective parties to this action duly excepted thereto, and that their respective exceptions are more fully embodied in their respective assignments of error on file and a part of this record on appeal.

It is further stipulated and agreed that the original of the exhibits on file in the above-entitled cause and Court [29] may be forwarded to the Circuit Court of Appeals, and that in printing the record on appeal that the copies of letters patent referred to in this Bill of Exceptions, which are herewith furnished to the clerk of the above-entitled court, may be used in the printed record, and that the re-printing of the same is hereby waived.

DORR & HADLEY,

J. W. KINDALL,

Attorneys for Plaintiff.

KERR & McCORD,

Attorneys for Defendant. [30]

[Bill of Exceptions or Statement of Case.]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED, That on the 11th day of September, 1911, the above-entitled cause came on for trial before the above-named court, the Honorable Judge C. H. Hanford then presiding, the plaintiff appearing by his attorneys, Messrs. Dorr & Hadley and J. W. Kindall, Esq., and the defendant appearing by its attorneys, Messrs. Kerr & McCord, and depositions, duly and regularly taken upon stipulation by and between the parties hereto, prior to the aforementioned hearing, were introduced as evidence, and showing the testimony to be as follows, to wit:

[Deposition of George W. Loggie, the Complainant.]

The deposition of the plaintiff in this case was taken into consideration, and showed his testimony to be that he claimed to be the inventor and patentee of that certain patent shown in the Exhibit

(Deposition of George W. Loggie.)

“A” hereinafter contained, which said Exhibit “A” was a certified copy of letters patent issued to the plaintiff and numbered 837,087; that he had put the same into use the latter part of the year 1904, and that [31] on or about January 23d, 1907, he gave the defendant notice that the defendant was infringing upon his rights under this patent.

Exhibit “C,” hereinafter contained, was then identified and introduced, the same purporting to be the photograph of a portion of complainant’s planing-mill.

Thereafter, the plaintiff, on his cross-examination as to the different parts of his patent, and in answer to the question, “I say in your patent that is the way it is, is it not?” stated, “The patent connects it with the trip—the trip is on the rear of the planer connected with the chute—the box that this runs in.” And in further explanation as to the operation of his patent, testified as follows, to wit:

“Q. The piece of lumber comes through the planer, enters into this box arrangement, which has a solid bottom, and that runs for a distance of two or three feet from the machine, and the piece that passes through, the next piece that comes from the planer strikes it and carries it on—forces it ahead, doesn’t it?

A. If I understand your question, this box is for the purpose of conveying the piece after it leaves the planer in the same position that it goes from the planer; this trip is for the purpose of carrying the piece far enough from the end of the planer so that

(Deposition of George W. Loggie.)

it will drop where required on the transfer belts.

Q. What I am trying to get at is this: You have a solid bottom up to the point where you want the drop to occur, so that it will fall right down and always fall evenly and register exactly.

A. Not necessarily—the bottom don't have to necessarily be solid up to there.

Q. What regulates the drop of the lumber—of the board going through?

A. It is the top piece holding the board; if I had something I could perhaps explain it here; it is the top piece holding the board in this manner; there is a shelf runs along herein; it comes out of the planer and enters. We will assume that this is the box and the side here and another side here, it comes along here; now, I will tell you what stops it from tripping—there is the trip, don't you see—we will say that this piece is passing through here and there is only an inch or so, when that comes out it will fall down, there is nothing to hold it." [32]

Afterward in this cross-examination, he testified as follows:

"Q. I say the trip is the top.

A. Yes, that is what guides the board and puts it in position, that guides it, and the two sides guides it so that it holds in position and whenever it comes past there there is nothing to hold that edge up, the weight being away from the ledge here, it has to fall, and we want it to fall both ends together, so that when it falls on the conveyor chains it will go parallel over to the band resaw."

(Deposition of George W. Loggie.)

The witness was asked if he had ever examined a certain patent numbered 299,832, known as the "Moore Patent," which is mentioned hereinafter, and a copy of which is hereinafter contained, and he stated that he did not know what this patent was, and that he did not recollect ever having examined patent No. 685,465, known in the trial of this case as the "Boyd Patent."

The witness again described his "trip," as follows:

"Q. Now, your particular trip consists just of a flat plank, does it not, Mr. Loggie—just a plank above.

A. A piece of wood or a piece of iron.

Q. A piece of wood or a piece of iron, but it lies practically horizontal with the bottom of this conveyor, does it not?

A. Yes, sir; I have nothing from the line of the bed of the planer to permit the piece you plane to pass under it."

Upon being questioned as to what was claimed as new about the patent, the witness testified as follows, to wit:

"Q. You don't claim anything new on the use of the conveyor for the purpose of carrying off lumber, do you?

A. I do in that particular place.

Q. I say because of the assembling of the machines, but so far as the conveyor itself is concerned that you don't consider new, do you?

A. In that application I do.

(Deposition of George W. Loggie.)

Q. I am not asking you for the application. I say so far as the use of the conveyor is concerned.

A. The conveyors are not new. [33]

Q. They have always been used?

A. Various kinds of conveyors have been used.

Q. Nothing new in your planer resaw trimmers; they are in common use in all mills, aren't they?

A. Yes, sir; planers are in use and resaws are in use in all mills—that is well regulated mills.

A. Conveyors are used in a general way for carrying sawdust and planer shavings.

Q. Yes, lumber and everything else.

A. Lumber, slabs and so on, but conveyors behind a planer is something I never seen until I put my own in."

As to what the plaintiff was claiming under his patent, he testified, as follows, to wit:

"A. No, sir, never until I put it in myself.

Q. Now, Mr. Loggie, you are claiming under a patent simply for an assembling of two planers, and trimmers, a resaw and a conveyor plus your tripper—plus your trip and that conveyor; that is what this amounts to—all of them old except the trip—all of them have been in common use for a number of years. A. All new to me.

Q. I say they have all been in use except this particular assembling? A. Yes, sir.

Q. Everything has been in use except the trip or that conveyor where it goes into this box—what do you call it—conveyor—this chute where the lumber

(Deposition of George W. Loggie.)

comes out of the planer and goes in onto the trip—
what do you call that device?

Q. You won't answer my question?

A. I don't understand it.

Q. Yes, you do, I think. I say, aside from this particular combination, this particular assembling of these different machines with this conveyor, this lateral conveyor, all of those with the exception of the chute and the trip have been in common use for years before you applied for your patent, haven't they? Conveyors have been in use and planers have been in use. A. Yes, sir. [34]

Q. Resaws have been in use? A. Yes, sir.

Q. Trimmers have been in use? A. Yes, sir.

Q. And the only thing new about it is the particular place in the mill where you place it?

A. The combination.

Q. It is the combination? A. Yes, sir.

Q. And the trip and chute you adopt as new?

A. I do."

And as to whether or not the different parts of this assemblage of machines would perform their different functions independently of one another, the witness testified:

"Q. Now, that trip and that chute performs the same functions and could be used independently of any combination with the lateral conveyors carrying it over to the resaw, couldn't it?

A. I wouldn't consider it practical.

Q. I say it would work out just the same way,

42 *Puget Sound Mills & Timber Company*

(Deposition of George W. Loggie.)

wouldn't it? A. No.

Q. It would register, would it not?

A. It would register.

Q. It would drop the boards in regular lengths and regular places?

A. Yes, sir, and in a few minutes it would fill up until it struck that conveyor, but it appears the same way.

Q. And performs identically the same functions that it does in the combination so far as that trip and chute is concerned?

A. It would drop them on the bare floor the same as it would on the conveyor.

Q. And performs the same function whether there is any other machine to take it away or not?

A. It would carry it out and drop it just the same if there was no object in having that done. [35]

Q. As a matter of fact, the use of this trip and the use of the lateral conveyors is simply an aggregation of two useful contrivances, isn't it?"

On being questioned again as to what the "trip" is, referring to Exhibit "A," in answer to the question, "for instance, what is '2'," the witness stated: "'2' in 'figure 1' is the portion of the trip, the hold down portion of the trip," and stated that the function that it performed was the holding in position of the piece of lumber until it would fall, and in connection with the definition of the "trip," testified further:

"A. Just as soon as it went through the trip. What is this '7,' what is this? The board would fall as soon as it went through the trip.

(Deposition of George W. Loggie.)

Q. Which do you refer to as the trip there—'2'?

A. As part of it; yes.

Q. Would it fall as it got just beyond '2'?

A. Just beyond '2'—beyond the trip."

As to the length of time that the plaintiff had been using that which he claims to have patented, he testified as follows, to wit:

"Q. Never had used a chute and trip for holding the lumber as it came out of the planer in a horizontal position until after the arrival of this planer from Beloit in June, 1904?

A. No, I don't think so—not that I remember of.

Q. You know whether you did or not.

A. I don't remember that, no, I don't; the present trips we perfected is the trips that are there now and was put in after this planer was put in.

.
A. I think there may have been something done on the conveyors, but I am not sure as to the trip and the completion of that; there may have been something done on those conveyors, but it was not perfected—that thing was not perfected until after that thing came in.

Q. I understand that, but so far as this chute is concerned and this trip is concerned you won't swear— [36]

A. I can't remember the exact date.

Q. You won't swear that you didn't have that thing perfect—so that you knew it would work actually in your mill prior to the arrival of that Beloit machine?

(Deposition of George W. Loggie.)

A. I do swear that we did not have it perfected until after that time.

Q. Yes, but you will not swear that you didn't have an actual device in your mill involving the same principle that did work prior to that?

A. No, I don't remember that—I won't swear to that, because I don't remember exactly. I don't remember those dates." [37]

On cross-examination, in reference to the length of time he had been using that which he claims to have patented, complainant, George W. Loggie, testified that he was working on the scheme involved in his patent quite a while before putting it in use in his mill; that he experimented for awhile. "The present trips, we put on some of the parts first and they did not work and we was quite awhile perfecting the machine. We began building our mill in February, 1903; we was working on this conveyor that you refer to some time in June, July and August, I think, perfecting the different conveyors and different arrangements—quite awhile perfecting them. * * * In the summer of 1904 we began working on it. * * * The principal one having charge of this work was Peter Westman."

Witness then refreshed his memory as to time of installing his patented device by reference to a bill for a planer purchased from Beloit, Wisconsin.

Complainant further testified on cross-examination, in speaking of the top guide of the receiving-trip:

"By placing it at different points we can place

(Deposition of George W. Loggie.)

it on the bed of the planer, or any distance wherever we desire the board to fall, to make all the ends register."

And, further, "the boards vary in length from 3 to 16 feet."

And in reference to the principle of the receiving-trip, he testified that the whole principle of his invention was simply an application of the laws of gravitation, coupled with the mechanical arrangement.

Being cross-examined as to the relation of the separate elements of his combination, he testified that they were separate so far as any mechanical connection was concerned, but that from a point of utility he would not consider one thing [38] good without the other, and that one would not be of any service to him without the other, and that planers used in his combination are for a special purpose.

On redirect examination, on being referred to complainant's identified Exhibit "A," being a certified copy of his letters patent, complainant testified:

"'2' in Fig. 1 is the hold-down part of the trip, and the function it performs is to hold the piece of lumber in position until it goes completely through it, then the piece falls."

Complainant then refers to "6" as part of the bottom (of the receiving-trip) and to "6" as the side of the "chute" at the rear end of the planer.

As to the length of time complainant had been using that which he claims to have patented, he further testified on cross-examination as follows:

(Deposition of George W. Loggie.)

“This device was in use in my mill something over a year, possibly between one and two years, prior to my making application for patent. * * * I do not remember the exact date that I first began the use of the device, but we perfected the arrangement after the installation of a planer shipped to us about May 11th or 12th, 1904, from Beloit, Wisconsin. This machine was installed and we shut down on the 4th of July. I don’t remember now the exact date of the installation of that machine, but I know we were working on the 5th of July on a portion of these arrangements. * * * ”

“Q. I understand that, but I say the trips you used in connection with that machine at that time you had not perfected so that they would work before that?

A. No, they were not perfected until after that planer went in there. [39]

Q. You never had used them before that time?

A. I don’t remember; I would not be sure as to that.

Q. Do you mean to tell me you hadn’t used this chute and the trip behind the planer until the arrival of this planer? A. Not the present trip; no.

Q. I understand the present trip, but I mean something similar to that.

A. No, I don’t believe we did.

Q. You mean to say you didn’t have a chute there for dropping this lumber until the arrival of this machine? A. I do mean to say so.

Q. You never had a trip in your mill prior to that

(Deposition of George W. Loggie.)

time? A. No.

Q. Never had used this trip in any mill at all or a similar trip? A. No."

In reference to this same matter complainant further testified on cross-examination that he had never made a model of his patent device, but figured on it in his mind and sketching on paper in his office before he ever spoke to anybody about it, or had it in any mill until after the arrival of the planer from Beloit, and then testified as follows:

"Q. I want you to tell just what you did. How did you find out it worked? A. By construction.

Q. You found that out before you placed your machines in position then, didn't you?

A. No, sir, I didn't; I found out after the machines were put in position, by actual practice and trial."

And complainant testified further, as follows, to wit:

"Q. The only thing that you mean in saying this is that you didn't have this combination until after the arrival of this machine—the combination patented.

A. I say we did not have the trip perfected until after that planer was put in."

On cross-examination the plaintiff explained the use of the down-holding devices on moulding machines and planers as follows:

"Moulding machines and some planers have down-holding pieces to hold the piece down to the head of the planer, where it is no object other than holding it solid to stop it from jumping and making rough

(Deposition of George W. Loggie.)

surfaces, but I have never seen the trip used for the purpose of letting a piece fall at the desired point."

[40]

[Deposition of W. H. Purdy, for Complainant.]

After the introduction of plaintiff's deposition, that of one W. H. PURDY was introduced on behalf of the complainant. In the year 1905 Mr. Purdy was in the employ of the defendant company. On direct examination he testified:

"I was foreman of the planing-mill of the defendant."

"A. I had nothing to do with putting in the planer or the arrangements behind the planers, only I changed the trip behind what was in there.

Q. How did you happen to change it? * * *

A. It didn't work just as I liked.

Q. Can you describe how that trip was before you changed it?

A. Yes, sir. Now, I had a six-inch board running out 20 feet or 18 feet—I forget now which.

Q. That was to the rear of the planer?

A. That was at the bottom right from the hind end of the machine right out 18 or 20 feet.

Mr. McCORD.—You mean by the hind end of the machine—

A. Where the board comes out.

Mr. McCORD.—The back end of the planer?

A. Yes, the back end of the planer; and then I had two sides. I had two sides; I had a side up, a short side, say like that, and then I had a long side up here like that, say this up here—and I had a wedge or the device that is in there, there was a

(Deposition of W. H. Purdy.)

wedge here, when the board come through here—

Q. Where was that wedge—on the side of the receiving-box?

A. Yes, sir; on the side, and that wedged the board off and it would drop down onto the conveyor and go over on the resaw.

Q. Did that arrangement work satisfactorily?

A. It worked all right. We run it a couple of months, but it—in crooked lumber it didn't work very good, and short lumber.

Q. Did you know anything about or hear anything about the device Mr. Loggie had in his mill?

A. Yes, sir.

Q. How did you happen to hear of that?

A. The man told me that Mr. Loggie had a better rig than that he thought. [41]

Q. Did you go over to look at the rig, as you call it, in Mr. Loggie's mill?

A. Yes, I went over and I asked Mr. Westman to see it, and he showed it to me.

Q. Did he explain it to you?

A. Yes, well, it didn't need any explanation, he took me out and showed it to me.

Q. And you looked at it? A. Yes, sir.

Q. Did you put substantially the same trip back into defendant's mill?

A. Well, similar—it was not exact.

Q. How did it differ?

A. Well, it was practically done the same, but it was constructed a little different—that is all.

Q. In what way, Mr. Purdy? Just describe.

(Deposition of W. H. Purdy.)

A. Well, now, to tell you—I can't remember exactly how it was—I know it was a little different, but the result was the same—practically the same.

Q. Now, in the trip that you constructed after you went back to Mr. Earles' mill from an inspection of Mr. Loggie's apparatus, did you have the trip right up against the planer or a little ways from it?

A. Right up against the planer.

Q. How many of these trips did you change after you went back from an inspection of Mr. Loggie's plant—do you remember?

A. I changed two twins and one single machine."

On cross-examination, in referring to the contrivance he first put behind the planer in defendant's mill, he testified:

"My device registered the ends of the boards at the further end of the planer."

And in reference to the size of the "wedge" on this contrivance he testified:

"It was about six inches high and about eighteen inches long. When the plank struck that wedge it just tilted off. * * * I did not have a box. I just had a half box. It was solid all the way out, only the wedge set on the solid bottom." [42]

Referring to Mr. Loggie's patented device he testified that in his experience in mills he had never seen the same sort of a trip in use as Mr. Loggie's, and that he had never seen that particular trip before he saw it in Mr. Loggie's mill, and that until he had seen Mr. Loggie's he had never seen a trip that would hold a long thin piece of lumber up until

(Deposition of W. H. Purdy.)

it got out of the planer and then dropped it.

On redirect examination, in regard to the construction of complainant's top guide of the receiving trip and its function in comparison with Exhibit "1" and the so-called trip in connection with the structure, he testified:

"Q. I call your attention to the first page of the plans of Mr. Loggie's patent as set out in Complainant's Exhibit 'A,' and ask you if you understand what that designated as '2' is.

A. It looks to be on the machine.

Q. Yes.

A. I should judge that is a piece on the machine holding the board down on top.

Q. Now, I call your attention to Defendant's Exhibit '1,' to the portion of the drawing marked 'Iron Shoe,' and ask you whether that iron shoe performs the same function as the part of the drawing in complainant's exhibit marked '2,' in holding the board down?

A. One gives and the other is stationary.

Q. But they both hold the board down.

A. Both hold the board down; yes, sir.

Q. Now, what is this trip you tell us about in connection with this sticker?

A. Well, there is no trip.

Q. There is no trip there at all, is there?

A. Yes, there is a trip.

Q. In the sense of Mr. Loggie's trip?

A. What?

Q. There is no trip there at all, is there, as you

(Deposition of W. H. Purdy.)

call Mr. Loggie's trip? [43]

A. There is just a drop, that is all. Mr. Loggie's is a trip."

As to the witness' reason for copying complainant's patented device he testified on redirect examination as follows:

"A. I never thought of Mr. Loggie's way, but I thought of a way that it could have been overcome, but it would have been some expense to have changed the things, and so I never thought about any trouble or any patent or anything, only the fellow told me he had a pretty good thing over there and I went over and seen it, and it was a little better than ours, and I put it in."

On cross-examination the witness Purdy testified that the Kelley fulcrum was not installed in defendant's mill until after he had left defendant's employ. [44]

After seeing plaintiff's mill he had made some slight changes in certain parts of that of the defendant, and upon his cross-examination as to the general use of the "trip," etc., testified:

"Q. You have seen that principle in use in box factories and in mills generally, have you?

A. Well, in a sticker; you put out—say the lumber is coming through here, you have a wooden shoe that holds that down, and say the cutter-head is here, you put that shoe on, you generally put it out here to hold it solid until it passes, when it gets past there it drops down—that is molding; some planers are different.

(Deposition of W. H. Purdy.)

Q. The principle of the trip is as old as the lumber business, then?

A. The object of the trip is a drop; it has been a long while.

Q. And this is one of the things that is universally recognized as being old in the manufacturing lumber business, isn't it, Mr. Purdy—the trip?

A. Why, yes, they have them in sawmills—all kinds of trips.

Q. Performs the same function this performs—holds it in position until tripped when the bottom underneath falls out?

A. They have different devices: some of them run over onto a table or onto belts or onto chain conveyors. Now, in the mill I am working now, as lumber comes out of automatic conveyors chains and there is a place there after it goes out a little ways further, there is a man puts his foot down and it trips and drops down on a derrick and then it raises up again; there is all kinds of trips to a sawmill."

[Deposition of Peter M. Westman, for Complainant.]

The deposition of one PETER M. WESTMAN, witness on behalf of the complainant, was next introduced in evidence, and he stated in his deposition that he was in charge of the planing-mill of the complainant in the summer of 1904, and had been thus in charge for a considerable period. He stated that he was familiar with the machinery of the plaintiff by reason of his long service at this mill. Upon being questioned in reference to portions of plain-

54 *Puget Sound Mills & Timber Company*

(Deposition of Peter M. Westman.)

tiff's patent devices, testified on his direct examination as follows: [45]

"In the spring of 1905 W. H. Purdy came over to our plant and told me that they were figuring in putting some new machines in Earles' (defendant's) mill and he wanted to see how we was handling our siding.

A. I took him through the plant and pointed out the transfer. I didn't show him any particular part of it, because a glance at the conveyors would show any mechanic about what there was to it at that time.

Q. At the time Mr. Purdy came over in the spring of 1905, that you just told about, did you have in your mill, in your planing-mill, at that time, substantially what is shown in Figure 1?

A. Yes, sir.

Q. Did you have in your planing-mill substantially what is shown in Figure 2?

A. We had part of it and part is omitted in this cut. We had another trimmer table on this side.

Q. Otherwise just the same? A. Yes, sir.

Q. Now, did you have the arrangement as shown in Figure 3?

A. Yes, sir; the rest of this would be useless without that.

Q. And you showed this to Mr. Purdy at that time?

A. Yes, sir. I pointed to the transfer—how we operated that.

Q. Did you see Mr. Purdy at the planing-mill at any time subsequent to that?

(Deposition of Peter M. Westman.)

A. Yes, sir, Mr. Purdy—

Q. When?

A. It would be in the neighborhood of two months later on.

Q. Did you have any conversation with him then?

A. I did.

Q. What was it?

A. He told me that they had put in transfers and that he had found some trouble in tripping the boards so they would even up on one end—that is, the boards would run along and fall off at random—a short board might run away out sixteen feet before it would trip—that seemed to be his trouble.

Q. Did you show him how your system worked there? A. I did.

Q. Did you show him the machines you had constructed according to the patent? [46]

A. Yes, sir; you have reference to the shoe part?

Q. Yes. A. I did.

Q. I have reference to the mechanism that received the board back of the planer, whatever you call it—I don't know what you call it—you call it the shoe; some call it the trip—in connection with the planer-bed.

A. Well, I should call that a shoe."

With reference to the length of time the patent devices had [47] been in use in plaintiff's mill, this witness testified on cross-examination as follows to wit:

"The planer that came from Beloit, Wis., was put in our mill June 6, 1904. Prior to that time we had

(Deposition of Peter M. Westman.)

none of these conveyors, chutes and trips constructed in our mill and had made no model of it. I did not do any work developing it. We put the device in on July 3, 4, and 5th, 1904, when the mill was shut down. It took us three days working with four or five mechanics."

With reference to infringement by defendant of plaintiff's patent device this witness testified—on cross-examination—that he had visited the defendant's mill but had not particularly noticed its machines. Thereupon he testified as follows:

"Q. There was some arrangement, then, for dropping the lumber even before you claim that Mr. Purdy came over and asked you about your arrangement, wasn't there?

A. Well, they had not completed their mill when he came over to see me—their mill was not in operation at the first.

Q. Not in operation at the first time?

A. No, they had just ordered the machines at the first time he was over."

With reference to construction of a portion of plaintiff's patent device, this witness testifies on cross-examination as follows:

"This shoe is fastened on the bed-plate of the planer. The shoe is a piece of iron or steel $\frac{1}{2}$ inch by $2\frac{1}{2}$, about 12 or 14 inches long. It is laid lengthways—it is not across the board. As soon as the board gets to the end of the shoe it drops down onto these transverse or lateral conveyors, and that insures all ends to even up right where you want them

(Deposition of Peter M. Westman.)

regardless of any length.

Q. You say Mr. Purdy told you his ends didn't work right—couldn't register the ends right; what did he tell you was the trouble?

A. About his shoe, that they wouldn't trip even on the end he wanted them to."

"I showed him our arrangements to make the boards trip even, this shoe we put on there."

"Q. And that is stationary and not movable, is it?

A. No. [48]

Q. Is there any way that you know of by which that could be extended out further? If it was extended two feet further it would perform the same function, wouldn't it? A. Yes, sir.

Q. It would not change the principle?

A. No, sir.

Q. I say, anything would do—it doesn't have to be iron or steel, does it? A. No.

Q. Did you ever see this fulcrum used in a place like that as testified to by Mr. Purdy this morning—an arm that comes down and is worked by a string and weight, or weight and string; as the timber comes through and strikes the elbow here it gradually slips it from under it; that would serve the same function, wouldn't it, as this shoe you are speaking of? A. No doubt but what it would."

And upon redirect examination this witness testified as follows:

Q. To get the record clear, Mr. Westman, what was it that you built there on July 6th, 1905?

A. On July 6th?

(Deposition of Peter M. Westman.)

Q. Yes.

A. We were about completing this transfer; that would be in 1904?

Q. Yes, that is it—1904.

A. We had this thing about completed on that date, July 6th.

Q. Did you build that trip and shoe on that date?

A. It was built sometime between the 3d and 6th—I couldn't say the date that shoe was built on, but it was between that date.

Q. Now, what would be the effect on the boards passing through the shoe or the trip if the shoe was placed across the boards,—clear across them,—would they choke up?

A. Why, if it come to a pointed board it would certainly be apt to wedge under the other one and the result would be your feed would stop.

Q. If you leave part of that box open and put this shoe [49] along lengthwise over one-third the surface of the board and leave the other open, does that avoid the choking up if you have a short board?

A. That brings it down to a very small percentage about choking up.

Q. That is, there is some give there then?

A. Yes, sir; I can run along and in the course of a week we might say we would not have a mishap of that nature."

On recross-examination this witness testified as follows: "Q. What difference would it make if the bottom of that box was solid clear across out to the edge of the tripper—out to the end of the tripper

(Deposition of Peter M. Westman.)

where the tripper let go—suppose at that point you only had a third of a ledge, the very moment the tripper let go and there was only a third of the ledge instead of the entire bottom it would dump it right off, wouldn't it?

A. I don't see no reason why that wouldn't work. I have not tried it.

Q. What do you mean by shoe? Point it out here. Is it shoe or chute?

A. No, I don't mean a chute. What you term a trip I would call a shoe—it is a piece of iron that is stationary; it is not a movable conveyor.

Q. What is it on that?

A. On this part here (indicating)?

Q. On that drawing Figure 1.

A. It would be this piece of iron that is bolted on here where the lumber passes under it.

Q. What number is it designated on this drawing, Figure 1—is it number 1? A. Yes, sir; No. 1."

And again, on his cross-examination as to a portion of the mechanism, testified as follows: [50]

"Q. This thing is fastened on to the machine, is it—this tripper of yours? A. Yes, sir.

Q. It is not fastened to the planer, is it?

A. Yes, sir.

Q. How is it fastened to the planer?

A. On the tail end of the machine."

[Deposition of James C. Kelly, for Defendant.]

JAMES C. KELLY, witness on behalf of the defendant, stated in his deposition, which was next introduced, that his business was that of mill build-

(Deposition of James C. Kelly.)

ing and designing, and had been so for a great number of years; that he had designed and built a great number of mills, sawmills and planing-mills, in Michigan, and was well versed with lumber manufacturing machinery. He stated that he was very familiar with the using of the "fulcrum" in order to tip or trip lumber and to carry it away from the machines in the manufacturing of lumber, and that so far as he knew he was originator of such "fulcrum"; that he had never seen it used before he used it himself; that the same was put into operation in Mount Pleasant Lumber Company of Michigan in 1878. "We used it for to take lumber as it was them days practically dressed on one side and passed through the planer and dropped onto—well, in them days we had no chains running, we dropped it onto those rubber belt conveyors, and carried it to the place where it slid down to be loaded on to the car." That the lumber came out of the machine and was dropped down on transverse belts and carried out in the other direction from that in which it was proceeding, this different direction being at right angles. [51]

"Q. Just explain what kind of a device that fulcrum was and its use in that connection.

A. When we first put that in it was a construction of a piece of wood in an oblong form with a lever that stood up in that manner, a pivot in the center, you see, and a string, a cord—a string to the other end of it to get the pressure on the piece to hold it in the form to carry it out until it passed where it

(Deposition of James C. Kelly.)

dropped on the conveyor.

Q. How did that appliance compare with the fulcrum in use at the Earles mill now?

A. It is my idea.

Q. The same appliance?

A. Yes, it is the same, but they never got it in as I explained it to the ones who put it in.

Q. You say that was in use in Michigan in 1878 or 1879—somewheres along there? A. Yes, sir.

Q. What sort of a machine was used in connection with it?

A. Well, it was used with a common planer for lumber and ties.

Q. Railroad ties?

A. Well, those ties that were for bridge building—all bridge building them days we had to size them.

Q. Just describe the chute, the conveyor, in which it came out and the use of the fulcrum there.

A. The planer had this fulcrum connected to it about as that piece of print is there, and held the tie or board as it may be until it got to the point to drop off the conveyor, and then it fell on those belts and went to the point—the way we used it, an inclined elevator with skids down to where it was loaded on the car.

Q. What kind of a chute was it?

A. Where the conveyor run up—

Q. I don't mean the chute of that; I mean where it left the machine.

A. That was a piece of plank and a side piece to it.

(Deposition of James C. Kelly.)

Q. That was just half a box, was it?

A. A quarter of a box, you might call it.

Q. One side of the box; and what was the size of the bottom?

A. The way we had that, the bottom was movable—we could make it wider or narrower. [52]

Q. Make it a third or a half or whatever you wanted it? A. Yes, sir.

Q. How far from the planer was this fulcrum fixed?

A. Well, now, I don't know as I could tell—I could make a rough guess—it must have been probably two or three feet.

Q. Then it passed under the fulcrum just as these planks do over here?

A. Exactly, yes, sir; that was the object in having it there, so as to hold that piece until it come to the point to drop.

Q. What about the regularity that these ends would register; how about that?

A. Well, that—after it come off of this bottom here it had to fall you know.

Q. Where would it fall with reference to the fulcrum—the end of the fulcrum?

A. They took place right together—the minute the fulcrum let go, the piece dropped.

Q. I will ask you how and what your experience was as to seeing the regularity with which it registered the ends as it fell—would it be regular?

A. Oh, yes.

Q. Did you have any top guides to that?

(Deposition of James C. Kelly.)

A. No, sir.

Q. Is there any necessity for top guides?

A. What?

Q. Is there any reason for top guides?

A. I couldn't see why there should be.

Q. Is there any necessity or was there any necessity?

A. Not that I know of providing that this lever—this fulcrumed lever is properly put on, I couldn't see any necessity for anything to go above it.

Q. That appliance, then, compares in what way with the appliance in use in Mr. Earles' mill—the defendant's mill?

A. Well, that fulcrum there is practically the same—it is filling the same place, but not properly made, as it was—a man could make that a good deal better than the way we had it for thick and thin timber.

Q. How does it work now over there? [53]

A. It appeared to work very well.

Q. Are there any top guides on that in addition to the fulcrum now in Mr. Earles' mill?

A. Well, I couldn't tell you.

Q. If they are there do they serve any purpose?

A. I didn't pay much attention.

Q. Who assembled the machines—that is, the planer, the conveyor and the transverse carriers?

A. I did.

Q. And the location of the resaw and the trimmers? A. Yes.

Q. Who designed that? A. I did." [54]

(Deposition of James C. Kelly.)

Plaintiff objected to the introduction by defendant of any testimony of the witness James C. Kelley relative to the prior use of the so-called Kelley fulcrum or lever, on the grounds and for the reasons that no such prior use was pleaded in defendant's answer, nor was notice of such defense given at any time prior to the taking of testimony. Mr. Kelley testified that the Michigan mill where such prior use of the fulcrum or lever occurred was located at Mount Pleasant, Isabella County, Michigan, and that Upton & Leaton were the proprietors. The deposition of one Marsena D. Swan, hereinafter set out, was introduced in rebuttal of Kelley's testimony in respect to this prior use, however, not in any manner waiving plaintiff's above-stated objections to Mr. Kelley's testimony.

With reference to the substitution of the fulcrum or lever for the Loggie top guide, this witness testified as follows:

"A. We put in a structure of a board on top of the—for to hold it down—a board instead of a lever—that run there until Mr. Martin came to me and asked me if I couldn't get some device that would stop it from going under the belt, so I gave him a drawing of this lever business. . . .

Q. He asked you to do that for what purpose you say?

A. He told me the boards was getting under the belt, did not hold this up right—the boards would drop before the time came to register them, you see, on the end. I told him if he would adopt the plan

(Deposition of James C. Kelly.)

that I proposed to him when we started to put them in there, and he asked me to make a drawing of that and I did so and gave it to him.

Q. That was put in that way—according to your idea? A. Yes, sir.

Q. That was the fulcrum you speak of?

A. Yes, sir. [55]

Q. And the fulcrum you copied from the mill that you had seen in operation in Michigan?

A. Yes, sir.

Q. You stated, I believe, at that time you designed the mill that was your instructions—your drawings showed the fulcrum in the first instance, did they?

A. Yes; that was the explanation I gave to the workmen that was putting it in, but they didn't get it in that form, as they didn't have a drawing of it—I didn't make a drawing of it to them at that time.

Q. Have you made a drawing of the mill that was in use in Michigan that you have been testifying about? A. Yes, sir.

Q. I call your attention to Defendant's Exhibit '1' and ask you if that is the drawing to which you refer. A. That is the one.

Q. Now, just explain how that operated, Mr. Kelley.

A. Well, now, we had a planer setting in this position; we had this lever, as we call it, this fulcrum lever on top of the quarter box; that dotted line represents the bottom; this represents the board coming out on top; that shows the bottom along there, and at the time it would pass through the trip here, of

(Deposition of James C. Kelly.)

course it was in this position here and would register right along over here, that trip let go right here."

[56]

[Deposition of David E. Lain, for Complainant.]

The deposition of the expert, DAVID E. LAIN, was introduced on behalf of complainant. For the purposes of brevity we shall combine the testimony of this witness in chief and on rebuttal. Witness said that he had had extensive education and experience in the field of mechanics and in investigating the patentability of electrical machines, consulting the United States Patent Office and frequently the English Patent Records, drawing up the specifications and claims and sometimes making the drawings; that he was a patent attorney, and as such had procured complainant's letters patent.

On being referred to Exhibit "A," being complainant's patent, and Defendant's Exhibits "7" and "8," being the letters patent of the Boyd and Moore patents respectively, and testifying as to the prior state of the art as shown by the Boyd and Moore patents as against the state of the art as shown by the Loggie patent, he stated as follows:

"From the specification it appears that an apparatus is described which consists of several machines assembled and relatively placed for a specific purpose, namely, to convert rough boards of approximately the same width and thickness but of greatly varying lengths into finished beveled siding of varying but standard lengths and deliver the same on to a grading-table with the ends nearest the graders ap-

(Deposition of David E. Lain.)

proximately registering.

With certain described improvements, the several pieces of apparatus, which are combined in this description are of old and well-known use as separate machines and carriers excepting the apparatus called a receiving trip. Two of these receiving trips are shown in Figures 1 and 3 of drawings in Exhibit 'A.' Both are alike, and I will now refer only to the one shown at the right of Figures 1 and 3, consisting of the several parts designated by numerals '1,' '2,' '3,' '4,' '4,' '7,' and '9,' '9.' This receiving trip consists of a removable guide '1,' attached to the side guide small 'm' of the way or channel in the bed of the planer 'A,' and overhangs this channel. It further consists of parallel guides projecting from the rear of planer 'A' together forming a partly open-bottom channel which is a right line continuation of said channel in the planer bed. This receiving trip receives the planed and matched boards which pass through planer 'A' and retains them, regardless of length in the same plane in which they passed through said planer until they have passed beyond the planer-bed, when they are permitted to fall through parallel positions on to a transverse carrier beneath.

This receiving-trip constitutes the new element in the combination of machines. When the several machines and carriers constituting the old elements in the combination are placed substantially in the related positions described and shown in Exhibit 'A'

(Deposition of David E. Lain.)

and the receiving-trip is placed in its described and illustrated position in the combination, the whole constitutes an apparatus which performs the stated functions and accomplishes the stated objects of this invention; for with this apparatus planed and matched boards of varying lengths are automatically carried from the rear of a battery of planers, delivered to a position in line with and in front of a resaw with ends nearest said resaw registering; from here they are passed by hand through said resaw in the reverse direction from that in which they went [57] through said planers; then they are carried laterally by hand and placed on a trimmer-table; after being trimmed they are thrown on a longitudinal conveyor and move in the same direction in which they passed through the planers to a grading-table, where they are deposited, all registering at one end. As compared to other methods of manufacturing siding: By means of the receiving-trip and lateral conveyor in combination with the battery of planers two or more off-bearers are saved; because the boards are delivered in a regular manner with ends registering next to the station of the resaw man, one man and one resaw are saved; because the boards are regularly delivered to the grading-table with ends next to the graders registering, the services of one or more graders are saved; because of the longitudinal conveyor two off-bearers are saved; because the conveyors handle the delicate pieces of boards and siding more carefully than is done by hand, stock is saved; and finally, because of the parallel and re-

(Deposition of David E. Lain.)

verse directions in which the separate pieces pass during the several treatments, floor space is saved. The invention, therefore, resides in the provision of the receiving-trip in combination with the several woodworking machines and the conveyors, all relatively placed in such manner that together they may operate as and for the purpose specified. CLAIM 1 consists of the following elements in combination: First, a battery of planers, or similar wood-finishing machines; second, receiving-trips—this element is limited by the qualifications that they are so constructed and placed that they will retain the stuff as it comes from the planers, in substantially the same plane as it passed through the said planers, until it has passed entirely out of the same; and third, a lateral conveyor placed at the rear of said battery of planers and beneath said trips. In this combination the receiving-trip constitutes the new element. The limitation noted in the claim serves to prevent it from covering receiving-trips differently constructed and placed and having different functions which may be hereafter invented. And therefore these limitations also serve to preserve this claim from being invalidated, because of earlier receiving-trips of different structure, placing and function.

Claim 2 contains the same elements in combination as claim 1, with the addition of a receptacle at the delivery end of the lateral conveyor. It is stated in the specification that this receptacle may be simply a space on to which the stuff may be dumped by the conveyor. Claim 3 contains the same elements

(Deposition of David E. Lain.)

as claim 2, with the addition of the resaw specifically placed. In this claim the receiving-trip has no further limitation other than it must be placed longitudinally behind its planer. Claim 4 contains the same elements as claim 3, with the addition of the resaws specifically located. Claim 5 contains the same elements as claim 4, with the addition of a longitudinal conveyor specifically placed with reference to said resaws. Claims 6, 7, and 8 cover a planer in combination with a receiving-trip of specified structure, and are therefore specific to this receiving-trip in combination with a planer. In the testimony of Mr. Brooks, near the top of page 6, claims 1 and 2 are objected to because they are stated as being functional. These claims are not functional for the reason that a mechanical structure, a receiving-trip, is mentioned. Also on the same page of Mr. Brooks' testimony claims 4 and 5 are objected to as being mere aggregations. Claims 4 and 5 are not mere aggregations because each of the elements of the claim is a mechanism which, although it might perform a specific function independent of the others, is necessary in the combination in order that the objects of the invention may be accomplished; [58] and when these elements are all and each arranged as specified in these claims the objects of the invention are accomplished; the removal of any one of these elements from the combination would prevent the carrying out of the stated objects of the invention beyond that part of the process; that is, all of the elements specified co-

(Deposition of David E. Lain.)

operate to produce the result desired. I hold in my hand Defendant's Exhibit No. 7, being a United States patent issued to Boyd. This patent is not pertinent to this case. Boyd states, page 1 of his specification, line 16, referring to character of his invention and the manner in which it operates, especially to the pipes which it is to handle, as follows: 'and be automatically delivered to the cooling-table.' A study of this specification reveals that the automatic parts to which he refers must be those mentioned in page 2, lines 109 to 123, in which fixed guides '41' and leaf guides '43' are described as serving to deliver the tubes, after they fall from the receiving trough '15,' '21,' '22,' on to the moving cooling-table. But the receiving trough '15,' '21,' '22,' does not automatically drop the tubes on these guides '41' and '43,' for this trough is moved endwise by hand lever '31'—see page 2, lines 76 to 82, Boyd's specification—and it is opened or tripped by foot lever '23'—see page 2, lines 44 to 47 and lines 124 to 135, of Boyd's specification. Therefore no automatically acting receiving-trip is shown by Boyd. His receiving-trip is operated by hand and requires an attendant.

One of the stated objects of the Loggie invention is to avoid the necessity for this attendant. I hold in my hand Defendant's Exhibit No. 8, being a United States patent to Moore. I have failed to find in this patent any structure that is the equivalent of the Loggie receiving-trip, and I find an arrangement of the machines similar only to a small part

(Deposition of David E. Lain.)

of the Loggie arrangement.

In the first place, I believe the first part of the Moore plant as illustrated in Figure 1 to be inoperative when long flexible strips must be handled as in the manufacture of beveled siding. I believe it is mechanically impossible to deliver long boards from planer 'X' to carrier belts 'A' behind said planer in such manner that they will be delivered by said carrier to belt 'B' as illustrated without the use of apparatus further than that illustrated and described, for the reason that if belts 'A' 'A' are nearly on a level with the bed of planer 'X,' the piece 'Y' will sometimes push these belts one side or run under them or at best board 'Y' will have its outer end dragged forward by the belts before it has entirely passed off planer 'X,' thus putting it in a position where it will not be shoved from the planer bed by the next piece; this trouble would also be true in a measure if instead of two belts 'A' 'A' one wide belt was substituted; although the stuff could not then run under this wide belt, still by the friction of the outer end, which would be lying on the wide belt, it would be carried forward by the conveyor, the conveyor would in its attempt to carry that end forward either so cramp it in the guides of the planer that the rollers couldn't push it through, or else the friction would be sufficient to actually break the piece if it proved to be easily broken as frequently occurs in such stuff. Thus frequently, if not usually, the boards [59] would be delivered from planer 'X' to carrier 'A' in a way to prevent

(Deposition of David E. Lain.)

the proper operation of the plant. Again, if carrier 'A' is some distance below planer-bed 'X,' the outer end of the board will drop down on to the carrier and either be drawn to a diagonal position on the carrier or occupy such a position that it cannot be pushed off of the planer by the board next following. No illustration in elevation is given in the drawings of Moore of the planer 'X' and carrier 'A,' therefore, these supposed positions are necessary. If it be allowed that this part of the Moore plant is operative with such short pieces of boards as bed-slats, it is certainly entirely inoperative with such long and flexible pieces as the Loggie receiving-trip is designed to and does handle with entire satisfaction. On page 8 of Mr. Brooks' testimony occurs a reference to the Moore patent, Exhibit 8, stating that since the boards leaving the resaw 'C' pass between rollers large 'B-3' and small 'b-3' and guides in the form of grooves which retain them in horizontal position until they have passed through the saw, the provision of the Loggie receiving-trip for retaining the stuff in the same plane as it passed through the planer is met. **THIS IS NOT TRUE**, for the reason that Moore specifically provides the wedge-shape piece 'I,' Figure 7, of the Moore patent, to separate the resawed bolts, the widest at the top edge, and throw them over, scarf side uppermost, on belt 'J' as soon as the resawed strip has passed entirely through the saw. Thus as fast as the bolt advances through the saw it is forced out of the plane in which it passed through the saw by wedge 'I.' It

(Deposition of David E. Lain.)

is not pertinent to refer to the plane of the table as the plane of the saw, for the reason that this may be changed without shifting the saw, and is often so altered. The plane in which stuff comes through a planer or similar wood-finishing machine, is the plane passing through the cutting device; in case of a planer the plane passing through is the line of contact between the cutter-head and the stuff; in case of a saw the plane must pass through the saw. Therefore, in the Moore apparatus the design, purpose and effect of the machine and the proper performance of its functions is to force the stuff out of that plane in which it passed through the machine as fast as it passes the saw.

A. I don't find anything in the Boyd patent to properly interfere with the validity of the Loggie patent.

Q. Or with the claims of the Loggie patent?

A. No, not as restricted, as they are, by the qualifying clauses in the body of the claims.

In reference to infringement by defendant by which installation and use of the Loggie patent devices in defendant's mill the witness Lain testified that he first visited the mill on April 1, 1907, and that Defendant's planing-mill was then almost an exact duplicate of plaintiff's patented devices which had been installed in plaintiff's mill, and that in the summer of 1907, on subsequent visit to defendant's mill, there were no changes; that late in September or early in October, 1908, defendant had replaced the Loggie 'top guides' '1' and '2' with a Kelly fulcrum or lever; that he visited defendant's mill again in

(Deposition of David E. Lain.)

April, 1909, and defendant had restored the top guides again which had first been removed; and that this applied to a twin matcher and a single matcher-planing machine, and that beveled siding was being manufactured therewith." [60]

On direct examination the witness Lain testified with reference to plaintiff's patented devices as follows:

"Q. In figure 1 what letters and lines indicate the trip?

"A. There has been rather a varied terminology used here in regard to that trip. For the purpose of patent description I referred to the device of Mr. Loggie's for retaining the lumber in place after it came from the planer as a receiving-trip. As I understood from him, the actual trip part was the top and guide pieces shown as '1' and '2' in that figure in the two planers and the receiving part the deep side guides numbered in the two cases respectively '3' and '4' and '5' and '6' and the—

Mr. McCORD.—Just wait a little bit.

A. (Continuing.) '3' and '4' are the deep side guides in the right-hand figure—you will notice the numbers at the very end—and the deep side guides '5' and '6' extending in the rear of 'planer B,' and ledges '4' attached to deep side guides '4,' and '6' attached to deep side guide '6.'

Q. That is the receiving-trip and conveyor?

A. No, that is the receiving-trip.

Q. That is the receiving-trip?

A. That is those guides in connection with that

(Deposition of David E. Lain.)

top guide '1' and '2,' which are duplicates of each other, I speak of for the purpose of this description as the receiving-trip.

* * * * * * * *

The WITNESS.—I think the only confusion occurring on the witness-stand this morning has come—

Mr. McCORD.—Just wait until you are asked.

The WITNESS.— —rather from a looseness in the choice of names here.”

WITH REFERENCE TO A SLIGHT TYPOGRAPHICAL ERROR in the patent the witness Lain testified as follows:

“A. There is a typographical error in the patent that came in an accidental way that no one especially is to blame for, and it is this: For instance, in page 1 of the specification, line 76, top guide '1,' it says: 'And top guide "1" the board "M" is driven,' and so on, it should not be top guide E1; it should be top guide One, and the trouble came from the typewriter using the same character for One and E1, and unfortunately I used E1 there for—

Mr. McCORD.—With that exception— [61]

A. (Continuing.) With that exception, which corrects itself in the E1 as referred to a few lines above as being a movable side guide—

Mr. McCORD.—I don't want to interrupt you, but I thought you were going over the same thing and I didn't see any use in it.

A. (Continuing.) With that exception the de-

(Deposition of David E. Lain.)

scription, I think, is very close and fairly carefully drawn.

Mr. McCORD.—We have had it checked and we think it is pretty accurate; go ahead, though. I don't want to interrupt you, but I didn't see any use of incumbering the record."

With reference to the use of the fulcrum on the machines in defendant's mill in October, 1908, and April, 1909, he testified on cross-examination as follows:

"Q. The fulcrum was in use on all the machines?

A. Yes, sir.

Q. And I believe you stated to Mr. Bruce that that performed the same functions as the shoe or tripper—

A. As a fixed shoe.

Q. It would have the same effect.

A. It is movable and the other is not—it is movable vertically and the other is not.

Q. But performs the same mechanical functions?

A. Yes, sir."

This witness testified that as attorney for George W. Loggie, complainant herein, he had made application for the plaintiff's letters patent No. 837,087 on June 16, 1904, and this was verified by certified copies of letters and files from the United States Patent Office, then offered and introduced in evidence. [62]

The witness was called on rebuttal and referring to claims 6, 7 and 8 stated:

"Claims 6, 7 and 8 cover a planer in combination with a receiving-trip of specified structure and are

(Deposition of David E. Lain.)

therefore specific to this receiving trip in combination with the planer."

And identified Complainant's Exhibit "H," which purported to be a certified copy of the Patent Office files in relation to the patent involved in this controversy, which was admitted in evidence over the objections of the defendant, which objection was that the same was improper evidence to be introduced as rebuttal.

The deposition of the witness J. B. Hann was introduced on behalf of the defendant, who testified that he had on June 21, 1909, taken the photographs of defendant's planing-mill, as shown by Defendant's Exhibits 2, 3, 4 and 5, which exhibits were respectively offered and admitted without opposition.

[63]

[Deposition of J. A. Allard, for Defendant.]

The deposition of J. A. ALLARD was introduced on behalf of the defendant to prove prior use of a portion of plaintiff's patented device, or its mechanical equivalent, and plaintiff objected to the witness' testimony in this particular on the ground that the same was immaterial and incompetent, and that there was no such issue raised by the pleadings. In this deposition he testified that his business was that of designing, and constructing mills, and had been so for seventeen or eighteen years, part of which time was spent in Montana and Massachusetts and the remainder in Washington; that he was familiar with the machinery described in the Loggie patent and having been referred to a copy

(Deposition of J. A. Allard.)

of the patent stated:

“Q. Now, referring to the chute that receives the lumber as it leaves the planer or battery of planers to carry it off to the transverse carrier that takes the lumber off over towards the resaw, I will ask you if you have ever, in your experience, had occasion to observe the use of a similar chute in the handling of lumber for sorting purposes elsewhere?

A. Yes, sir.

Q. Now, just describe what other similar appliances to that you have seen and describe it and where you saw it.

A. I was running flooring through a chute with a bottom in it and any time you wanted to drop lumber out of it there was a part of a bottom out, which allowed the lumber to tip down; you could run it any place [64] you wanted to run it—any distance—and drop it down; one piece of flooring pushed the other.

Q. You say the bottom was false?

A. False bottom.

Q. A portion of the bottom was out.

A. Yes, sir.

Q. What proportionate part was left in—was a third of it?

A. Well, if we were running four-inch flooring there would be an inch and a half left in it so the flooring would drop down.

Q. That flooring constituted what is referred to in the Loggie patent as the ledge?

A. We used to have an inch board we used to run

(Deposition of J. A. Allard.)

up to the roll that when a crooked piece of lumber come, it would not go over the chute, but held it down in its position until it got to the place where it dropped, and after that the next one.

Q. I am asking you now about that portion in the bottom of the chute which you are referring to as left that constituted a sort of a ledge corresponding to the ledge in the Loggie machine. A. The trip?

Q. The thing that held it up under the bottom—the false bottom. A. Yes, sir.

Q. Now, then, what appliance was used to hold the lumber that was passing through that chute on the ledge in position to keep it from falling off?

A. It was a box—a rigid box—that is with two sides.

Q. It had a top on, did it?

A. Two sides and a top.

Q. The top held it down in position?

A. Yes, sir.

Q. And kept it from falling until it passed out from under the top; after it reached the edge of the ledge it would tumble off, wouldn't it?

A. Yes, sir.

Q. Now, I will ask you as to the principle of the false bottom and the principle of the top of the box, of holding it in position, how long has it been since you saw appliances in common use in this country?

[65]

A. In this country?

Q. Yes, I mean in the United States.

(Deposition of J. A. Allard.)

A. We had that one in Boston fifteen or sixteen years ago—something—

Q. What mills in Boston did you see it in?

A. Cressie & Noice.

Q. Was that used in connection with the planer?

A. Yes, sir; flooring; went through the planer.

Q. And the function of that was to—was what—to cause the lumber to drop—sort the lumber, dropping it at regular intervals? A. Yes, sir.

Q. That is the same thing that Mr. Loggie's—that is one of the functions that his appliance has, hasn't it—to drop the lumber and sort the lumber?

A. Why, he carries his lumber—it is just about the same principle—he carries his lumber to the distance where he wants to drop it and then he drops it.

Q. Then the solid plank on the box that you refer to takes the place of what is known as the trip in the Loggie patent, does it not? There it performs the function of holding the lumber down? A. Yes, sir.

Q. Did you ever see that chute used elsewhere?

A. No, I put one in similar to it at the Seattle Cedar Lumber Company.

Q. How was that?

A. That is the same only it is a battery of planers there, but I used this same idea there.

Q. Had you ever seen or heard of the Loggie patent?

A. I never did until here about ten days ago or a week ago.

Q. How did you devise your particular arrangement at the McEwan mills in Ballard?

(Deposition of J. A. Allard.)

A. Why, it is so simple that anybody could.

Q. You devised it from what?

A. From ideas I had and seeing this other one.

Q. From the ones you had seen where?

A. In Boston. [66]

Q. How have you ever seen the transverse carriers that take the lumber over to another place so as to carry it back to the re-saw; you have seen that used—a conveyor for carrying lumber haven't you?

A. Yes.

Q. Where did you ever see that, how long ago?

A. You mean the conveyor?

Q. Yes, the conveyor—carrier—transverse carrier which takes it off to the side.

A. You mean transfer—you mean transfer or conveyor?

Q. Transfer.

A. Well, transfers have been used, I wouldn't say—as long as my memory—that is what they call a sorting table.

Q. The conveyor, of course, is old, isn't it?

A. Oh, the conveyor is—I have seen them ever since I can remember—that is, in different forms.

Q. When did you put in this appliance out at the McEwan mill?

A. I think either in the spring of 1905 or 1906—I wouldn't say which now—I am not prepared to say which of them two—it is when I remodeled the mill; it is on record.

Q. And that is similar to the one you saw in Boston? A. Yes, sir, I took it—

(Deposition of J. A. Allard.)

Q. And similar to the Loggie—

A. From that idea.

Q. The functions are the same, a false bottom?

A. Yes, sir.

Q. The top acts as a trip to hold the lumber in position until it passes out from under it, and then what causes it to fall?

A. On one side there is a part of the bottom left and any piece lumber that was more than that difference in width would drop down there.

Q. By force of gravitation?

A. By gravitation; yes." [67]

On cross-examination this witness testified as follows:

"Q. That is, you only had one planer that worked on cedar siding? A. That is right.

Q. You never put in a mill that had any more than that? A. No, sir.

Q. How many planers were used in this mill that you say the trip was used where the flooring was manufactured? A. Only one planer.

Q. Just one planer? A. One planer.

Q. Where was the flooring conveyed after it was dropped?

A. Conveyed on a level floor and dropped on horses where it was bundled up.

Q. What did it drop on to?

A. Dropped on some inclines and on some horses to be bundled.

Q. As it got in the rear of the planer and out of the planer and in this chute it dropped, did it?

(Deposition of J. A. Allard.)

A. That is right.

Q. Would it always drop in the same place or drop at various places? [68]

A. A ten-foot piece would drop in the same place every time, a twelve-foot would pass along and drop in the next one, a fourteen-foot would drop in the second one, whatever way you start, at ten feet, every two feet you would drop two feet further on.

Q. It would drop right where you wanted to use it?

A. Yes, sir.

Q. And it would be bundled up there?

A. It would be bundled,—tied.

Q. Right where it dropped?

A. Right where it dropped.

Q. So that there was no transverse conveyor underneath there? A. No, sir.

Q. You have examined the specifications in this patent of Mr. Loggie's? A. Yes, sir.

Q. Have you ever seen a similar arrangement of machines described in there in any planing-mill?

A. No, sir.

Q. Never have? A. No, sir.

Q. Did you ever see that trip used in connection with a planer before? A. No, sir." [69]

[Deposition of J. D. Hills, for Defendant.]

The deposition of J. D. HILLS was introduced on behalf of defendant to prove prior use of the structure resembling portions of the Loggie patented device, to which deposition and testimony plaintiff objected on the ground that the same was incompetent and immaterial to prove any issue under the plead-

(Deposition of J. D. Hills.)

ings. The witness testified that he was engaged in the business of mill designing and as a salesman of machinery, and had been so engaged for a period of twenty-five years; that he had examined the Loggie patent and particularly that part thereof known as the "chute," and upon the question as to whether he had ever seen a chute similar to this in use prior to June 16, 1904, proceeded to explain a contrivance used in mills for a long period of time prior known as the "V" trough and stated:

That the "V"-shaped trough he had reference to had no top, and that it merely consisted of two boards put together in a V-shaped manner with slots cut to let the boards drop, and a small chain running along the bottom of the drop to carry along the boards till the boards get to the openings through which they drop. The witness testified that he had never seen a receiving-trip constructed in the form described in the Loggie patent, and that he had never seen a battery of planers placed together in a cedar-siding mill, and that under the method in use outside of the method described in the Loggie patent to get the lumber through its process when being manufactured into bevelled siding it was handled by hand. He further testified that he was not a planing-mill man.

"A. The lumber passed through a 'V' trough; it might lay on one angle or on the other, and the lengths in this particular arrangement, lengths of lumber, were all the same, starting with a four-inch width, as this lumber went along this inclined side when it came to that opening the four inch would lay there,

(Deposition of J. D. Hills.)

if it laid on the other side it would do the same thing there, and the next piece being six inches it would pass over and drop into another opening that would let a six-inch [70] piece through, and along up to as wide as they was sorting."

He further testified that the different elements of the Loggie patent would perform identically the same functions in the positions in which they were placed by Mr. Loggie as the *different ordinarily* perform in every mill; that is so far as the functions of the planer, re-saw, carrier and chute are concerned, each performs its functions independently of the other, and that he did not believe it required any inventive skill to arrange the machinery in the manner in which it is arranged in the Loggie patent, and each of these different elements would perform the functions that it did perform whether the other elements were present or not. He further testified that it was an aggregation of machines and not a combination.

[Deposition of Charles Cobb, for Defendant.]

The deposition of the witness CHARLES COBB was introduced on behalf of defendant, and this witness testified that he was planing-mill foreman in defendant's mill, and that about two or three weeks prior to June 29, 1909 (the date of taking his deposition) the flat board had been removed that constituted the top guide of the receiving-trip mechanism which had been installed in defendant's planing-mill. [71]

**[Deposition of Marsena D. Swan, for Complainant
(in Rebuttal).]**

On rebuttal, the deposition of one MARSENA D. SWAN, of Isabella County, Michigan, was introduced in behalf of complainant. He testified that in the later seventies and early eighties he was working in the Upton & Leaton sawmill at Mount Pleasant, Michigan, as setter, head sawyer and foreman at various times. He further testified:

“I worked in this mill all the time that James G. Kelley worked there. The mill cut pine, hemlock and various kinds of hardwood into lumber dimension stuff. About in the eighties the mill cut railroad ties for the Ann Arbor Railroad and some oak bridge ties for the Pere Marquette Railroad. I was familiar with the machinery, conveyers and carriers in the mill and helped to keep them in repair.”

The means used to convey the lumber away from the mill after being sawed was a horse and car. The lumber, slabs and timber was conveyed from the saw on live rollers. The lumber was passed through an edger and then a set of trimmers and then onto live rollers and conveyed to the horse car. They experimented on cutting railroad ties for The Ann Arbor R. R. Co., and at that time they put up a set of rollers to convey the ties out of the mill to a platform that was erected beside the tramway at the height of a flat car, there to be loaded onto the car by hand. That set of rolls was operated by a belt and pulley; and the same was started and stopped by a tightener operated by a man.

(Deposition of Marsena D. Swan.)

I was well acquainted with one James G. Kelley, a millwright, during the time I was working in said mill. He was head sawyer, filer, millwright and engineer at different times. I worked with him at millwright work. He was a good millwright and a good all-round mill man.

The device used to transfer the ties was a set of rollers put in a frame that extended out to the loading platform, from the end of the live rollers where the slab saw was located. The rollers were driven by the use of a belt and pulley which was stopped and started by raising and lowering a tightener. As we did not have a carriage that we could cut less than twelve feet on, we had to cut all the tie timber sixteen feet long, and then as it came from the saw on the live rollers to the slab sawyer, he had a device to stop the tie timber at a point eight feet from the end and then he with slab saw cut the tie eight feet, and then as it passed on, the slab sawyer, by means of lowering the tightener on to a belt it started the rolls and conveyed the ties to the loading platform.

The device I have described as being used to convey the ties to the loading platform was designed by James G. Kelley, and built by Kelley and myself.

I have examined the blue-print marked 'Copy of Defendant's Exhibit I,' and have to say that there was no such device nor anything similar to it, to my knowledge, in the said mill at any time." [72]

[Deposition of Stephen A. Brooks, for Defendant.]

The deposition of the expert, STEPHEN A. BROOKS, witness on behalf of the defendant, was next introduced, who identified Defendant's Exhibit 6, being a copy of the patent issued to Thomas J. Bray and being numbered 721,006, identifying at the same time Defendant's Exhibit No. 7, being a patent issued by the United States Patent Office to one Peter Boyd, and being numbered 685,465, and also identifying Defendant's Exhibit No. 8, being a copy of the letters issued to William H. Moore, numbered 299,832, all of which three exhibits were admitted in evidence without any objections.

As to Mr. Brooks' qualifications as an expert witness, he stated that he was an attorney in patent causes and actively engaged in the practice as such attorney in the [73] city of Seattle, State of Washington; that he had about nine years' experience in the city of Washington in the Patent Office, and had been in constant attendance on examinations of patents in that office; that he had been actively engaged in the practice of the patent attorney in Seattle for about four years, and was a member of the firm of patent attorneys in that city by the name of Adams & Brooks, and had been admitted to practice before the Patent Office in Washington for a period of about ten or eleven years; that the evening before testifying he had examined the machinery used by the defendant company, which was in controversy in this action, and less than a week before testifying had examined the specifications of the pat-

(Deposition of Stephen A. Brooks.)

ent introduced in evidence by the plaintiff. Relative to these letters patent he stated:

“A. The invention set forth in the Loggie patent, as I view it, is the provision of a transfer means acting to transfer lumber from one conveyor to another; said conveyor being angularly disposed. The description of Loggie, in coming down to the essence of the patent,—or invention, sets forth many other objects, among which is found the reduction in the amount of floor space and the improvement in conveyors. If the invention designed in the provision of the transfer means, *in the broad spirit it is immaterial from what conveyor the article conveyed is transferred.* Therefore, in the Loggie patent, the feed rollers (small *f* prime) constitute a conveyor, from which the boards are transferred to a lateral conveyor consisting of a plurality of belts (16). To prevent the board from tilting, as it passes from the conveyor of the planer, a so-called ‘trip’ is employed. The description of this trip is indefinite, and the drawings do not bear out the description with the reference characters used therein. However, Loggie states that on top of one of the side guides of the feedway of the planer he provides a removable guide, which projects a short distance over the floor (small *i*) and boards delivered from the planer, in passing on the parallel guides (3 & 4) arranged over the lateral conveyor, are supported by the last-named guides in a substantial horizontal position until they have passed free of the planer, when their rear end portions, becoming disengaged by moving

(Deposition of Stephen A. Brooks.)

from under, the top guide and as the said boards are permitted to fall by gravity from the supports (3 & 4) so as to strike at all points simultaneously on the lateral conveyor. In this connection, in figure one, the removable top guides are indicated by the reference numerals (1 & 2) and another guide, improperly lettered, (small) [74] (1), which latter reference character, according to lines 72 to 100 of page one of the description of Loggie, is intended to indicate the guides (1 & 2).

.
Claims 6 & 7 & 8, I believe to be specific to the top guides attached to one of the said planer-bed's side guides and extending over said channel backs.
.

The second object specified by Loggie, with respect to the reduction of the amount of floor space is accomplished by arranging the machines in a compact form. With the course of the product being clear, by reference to figures 1 & 2, in which from the planer (M & O) the planks are tripped onto the lateral conveyor, then deposited on to 1226, transferred by hand, to the re-saw, then to the trimmer, and finally the trimmed stuff all thrown onto the conveyor (30) and conveyed to the grading table (41), One (1) indicates a support for guiding the strips of wood in their travel from the planer, said supports extending rearwardly from the planer, and being provided with a retainer tube, which latter is yieldingly pressed into the path of the travelling strips, and is adjusted by the same to compensate

(Deposition of Stephen A. Brooks.)

for varying thicknesses in the lumber planed.

Retainer (2) in fulcrum, or pivotly supported on a hanger (3), and is connected by flexible connection (4) passing over a sheave (6) to a weight (5). Retainer (2) has an end serving as a shoe, which projects downwardly onto the support (1) and normally rests against the bottom wall thereof; and the upper end of this retainer is connected to the flexible connection (4) whereby the weight (5) exerts a pressure tending to yieldingly hold the shoe of the retainer in the path of the travelling strips. By this construction the retainer acts identically, whether a thick board or a thin board, with leaving the planer. The only difference being that the retainer, in the passage of a thick board, is elevated more than in the other instance. In the prior art (see U. S. Patent to Moore) (2 double line 832) in which the conveyor (large *A*) is arranged at one end with the planer (large *X*) to travel on an angle thereto. By this construction a bolt (see lines 20 to 45 of page 2 of description) coming from the planer (large *X*) falls across two belts (large *A*) by which it is carried across and deposited on an endless belt (large *B*) belting 'B' forming a conveyor, carries the boards to a re-saw (large *C*) from which the divided pieces are conveyed to conveyor (large *J*) to a planer (large *L*). In view of this patent, it is obviously an old expedient to equalize on space by the arrangement of conveyors in substantially the same manner as illustrated in the Loggie patent; and in view of this patent to Moore the only re-

(Deposition of Stephen A. Brooks.)

maining feature to be considered is some means for retaining the strips so that they will be maintained in a substantial horizontal position until they are entirely free of the planer, or its equivalent. That it is not new, too [75] broadly supports the article to be transferred until it is entirely free of the means from which it was discharged, is shown by reference to Boyd, 685,465, in which we have a support, or trough (15) arranged over one end of a conveyor, designed to receive the article transferred from the mechanism indicated at 24. This apparatus aims to provide an efficient means for transferring from sizing roll (24) pipe or bars, to a lateral conveyor having the projection (12).

That this support must be provided with a retainer is apparent. And for this purpose a pivoted section (16) is provided, the latter, upon freeing the pipe or bars, permitting of the same to fall by gravity to the lateral conveyor in such manner that one end thereof cannot fall on the conveyor in advance of the other end. (See lines 65 to 70 and lines 78 to 82, of page 1 of description.)

That Boyd was not the only one to provide a transfer means which support the strips of wood, or its equivalent, in a horizontal position, until, when freed they would fall in the same manner as in Boyd, reference should be had to Moore above referred to, in which from the re-saw (c) to the planer (1) is an intermediate conveyor (j) onto which the strips produced by the re-saw fall by gravity. This action being accomplished by the provision of a roller

(Deposition of Stephen A. Brooks.)

(large B-3) (Small b-3) and guides in the form of grooves (small i). By reference to lines 71 to 75 of page 2 of description to Moore, we find 'when they are relieved (slats) from the grasp of the rolls (small d-3), (large D-3) they fall apart, saw scarth upward, on the top of the endless belt (large J).'

In view of the description in Boyd and Moore, we find that when Loggie entered the field of invention, first, the arrangement of a lateral conveyor, with respect to a planer identical with his, was owned. And second, that it was not broadly new to provide a transfer means which received and held the article to be transferred until the said article could be dropped as an entirety onto a receiving conveyor. If this be true, and Moore and Boyd, I believe, disclose such facts, then Loggie has at most produced an invention of a specific nature.

.

In claims 6, 7 & 8, we find the limitation of the top guide which acts to retain the strips leaving the planer. Now, in defining from the preceeding claims the invention has been brought down to a specific arrangement of parts, and that specific arrangement of parts must be construed, if granted patentable invention, in the light of a prior art. Therefore, the prior art discussed having disclosed that it is old to transfer from one mechanism to a conveyor by means which hold the article transferred so that it cannot fall onto the receiving conveyor until it can fall as an entirety, said conveyor being latterly disposed, then a subsequent invention

(Deposition of Stephen A. Brooks.)

for a similar purpose must in its claims define from such structure. And if the required patentable invention, to adopt a device old in the metal working art to the wood working [76] art, then such patentable invention must absolutely reside only in such means which adopt the old machines, or transfer device, to the new art.

And so where Mr. Loggie appeared in the field subsequent to a number of other parties, and worked along the same lines, with the same object in view, his invention cannot be considered in any other light than an improvement on such power, and any claims presented by him, depreciating in terms, must be read and their scope determined by the art in view of which they were drawn.

The device illustrated in exhibits 2-3-4 & 5 is an improvement over the construction shown in Boyd, wherein a trough-shaped support and pivoted retainer is employed. That it is an improvement over said construction to Boyd is evinced by the failure of the latter to accommodate bars varying in thickness, or diameter, and that it is an improvement over Loggie for the same reason.

In view of the matter, from a mechanical standpoint, it appears that it was Loggie's intention to obtain efficient results by a compact arrangement of the parts, which will be understood that in Moore 299,823, a structure was shown on which the patentee absolutely believed that new direct mechanism would be necessary at the juncture of the two con-

(Deposition of Stephen A. Brooks.)

veyors, moving at right angles. That is another point in this mechanism problem—that is, in where he allows his strips to fall onto a conveyor after having been sawed, he realized the necessity, or deemed it advisable, to provide a guide at this point. By this guide, when placed at the rear end of the planer (large *X*) a substantial equivalent of Loggie's structure would be presented.

In view of that light, and especially in view of the patent to Boyd, wherein the support and retainer is illustrated, it proved beyond a doubt that the invention in all broad respects is disclosed by the prior arts, and that it is extremely doubtful as to whether or not a skilled mechanic, with these patents, construing the prior art before him, could not have constructed a transfer device of the type shown in both Loggie's and exhibits 2-3-4 & 5.

If this was within his realm, or scope of work, then patentable invention would not be held to be passed by either structure." [77]

Complainant's Exhibits "A," "B," "C," "D," "E" and "H," and Defendant's Exhibits "1," "2," "3," "4" and "5" were admitted in evidence without objection, except that Complainant's Exhibit "H" was objected to by defendant as is hereinbefore recited.

Thereupon, in furtherance of justice, and that right may be done, the parties hereto present the foregoing as their Bill of Exceptions or Statement of Facts, and pray that the same may be settled, allowed, signed and certified by the Honorable Judge

Cushman, who has succeeded the Honorable Judge Hanford, all in the manner provided by law.

DORR & HADLEY,
J. W. KINDALL,
Attorneys for Complainant.
KERR & McCORD,
Attorneys for Defendant.

[Endorsed]: Stipulation and Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington. April 16, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [78]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Complainant's Exceptions to Interlocutory Decree.

Comes now the above-named complainant, by Attorneys Dorr & Hadley, and J. W. Kindall, and makes the following exceptions to the interlocutory decree herein heretofore entered, which exceptions are particularly as follows, to wit:

Complainant excepts to

98 *Puget Sound Mills & Timber Company*

1. The interlocutory decree, and the whole thereof, as heretofore signed by this Court.

2. That portion of said interlocutory decree finding Claim 1 of complainant's patent invalid.

3. That portion of such decree finding Claim 2 of said patent invalid.

4. That portion of said decree finding Claim 3 of said patent invalid.

5. That portion of said decree finding Claim 4 of said patent invalid.

6. That portion of said decree finding Claim 5 of said patent invalid.

7. That portion of said decree reading as follows, to wit:

“It is further ordered, adjudged and decreed that that certain substitution adopted, constructed and installed by the defendant in its mill avoided infringement of complainant's patent, which substitution is described as follows: A down-presser of the lever and fulcrum principle, resembling in form [79] a human foot attached by a pivot pin at the ankle joint to a stanchion, with the heel part toward the planing machine and elevated so as to permit the boards to pass under it, the toe part acting as the down-presser, the power of the lever being effectuated by a suspended weight attached to the heel by a cord looped over an overhead pulley to raise the heel so that the weight presses the toe down and the inclined position of the foot permits the boards to pass under it and, when shoved beyond the toe, to tip and fall from the under-support through the open space between it and the side wall of the chute, down

upon the lateral carrier.”

8. Complainant further excepts to the refusal and failure of the Court to grant by said interlocutory decree injunctions in favor of complainant and against defendant enjoining further infringement of, respectively—

- (a) Claim 1 of complainant's patent;
- (b) Claim 2 of complainant's patent;
- (c) Claim 3 of complainant's patent;
- (d) Claim 4 of complainant's patent;
- (e) Claim 5 of complainant's patent.

These exceptions are noted in this manner and at this time for the reason that said interlocutory decree was signed in chambers by the Honorable Judge Cushman, of the above-entitled court, while absent from the city of Seattle, at which place the cause is pending, and in the absence of the attorneys in this cause, and these exceptions are thus made and noted by stipulation between the attorneys for the respective parties hereto.

DORR & HADLEY,
J. W. KINDALL,
Attorneys for Complainant.

O. K.

KERR & McCORD,
Attorneys for Defendant.

[Endorsed]: Complainant's Exceptions to Interlocutory Decree. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 17, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.
[80]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

**Order Allowing Complainant's Exceptions [to Inter-
locutory Decree].**

The complainant's exceptions to the interlocutory decree in the above-entitled matter having been called to the Court's attention, and it appearing to the Court that said exceptions, as so made and noted by attorneys for complainant, should be allowed, for the reason that said interlocutory decree was entered by the undersigned Judge of said court in chambers while he was absent from the city of Seattle, and at a time when none of the attorneys in said cause was present;

It is now therefore ordered that said exceptions of the complainant to the said interlocutory decree be,

and the same are hereby, respectively allowed by the Court.

Dated this 18th day of February, 1913.

EDWARD E. CUSHMAN,

Judge.

O. K. as to form.

KERR & McCORD,

Atty. for Deft.

[Endorsed]: Order Allowing Complainant's Exceptions. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 19, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [81]

[Opinion.]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1640.

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Filed ———.

Suit in equity for an injunction against continued infringement of a patent for sawmill apparatus and for an accounting and damages for past infringement. On final hearing. Decree granting an in-

junction and awarding nominal damages.

J. W. KINDALL, S. M. BRUCE, DORR &
HADLEY, for Complainant.

DELBERT H. DECKER, on Complainant's
Brief.

KERR & McCORD, for Defendant.

HANFORD, District Judge:

This is a patent infringement case, founded upon United States letters patent No. 837,087, issued to the complainant for a combination of sawmill apparatus styled "Receiving-Trip and Conveyer." The specifications of the patent describe an assemblage of machinery with conveyers, guides, bins and tables conveniently arranged in the interior of a factory for making weather boards for covering the exterior walls of houses.

The aggregation comprises two or more planing-machines, set parallel to each other; guides, adapted to clamp the pieces of timber, on which the planers operate, after they pass the cutters to hold them flat, straight and level until the entire length of the pieces have passed from the discharge ends of said machines and then drop them transversely upon a series of carrier belts, [82] which, actuated by pulleys, carry the pieces laterally in a direction at right angles to the line on which they have traveled through the planing-machines; a bin or platform, into or upon which the pieces are deposited by said lateral carrier; a re-saw, which divides the thickness of the planed pieces making of each two bevel-shaped weather-boards, which is set in a position parallel to the planing-machines; a trimmer table,

upon which the boards are deposited after passing the re-saw, which is also set parallel to the other machines and has suspended on hangers above it, two trimmer saws; a longitudinal traveling belt, on which the boards are carried longitudinally from the trimmer-table to a sorting-table, from which the boards may be taken as required to be stacked or loaded into cars or wagons. The entire apparatus is designed to operate upon pieces of lumber of the required width and double thickness of weather-boards, and of varying lengths, to surface, divide, and trim them in a continuous movement. The guides and lateral carrier act automatically in delivering the planed pieces from the planing machines to the bin or platform, with ends nearest the re-saw registering. It is unnecessary to describe in detail all of the minor equipments described in the specifications of the patent; the guides, however, must be particularly described. They are in two parts, the first of which consists of two boards or pieces of scantling forming the sides of a chute set horizontally upon, or into, the bed-plate of each planer, spaced to form a channel between the two, wide enough to accommodate the passage of the planed pieces as they travel flatwise through and from the planers; one of the said side-strips being movable so as to change the width of the channel if required to accommodate wider or narrower boards; the other side-strip [83] is fixed rigidly, and has annexed to it a bottom piece forming an under-support for the planed boards which is less than one-half as wide as the boards which are shoved upon it as they

pass through and from the planer; there is also annexed to said rigid side-strip, a top board jutting over the under-support which acts as a down-presser, holding the boards down upon the ledge or shelf constituting the under-support. Said rigid side-strip, the under-support, and the down-presser constituting a side groove through and along which one edge of the planed boards travel through and from the planer, holding the board flat and level until it has passed beyond the bed-plate at the discharge end of the machine; the second part of the guide is an extension of the side-strips and the under-support extending longitudinally across and above the lateral carrier, held in position by hangers attached to overhead beams and abutting end-on to the side-strips and under-support of the first section; the side-strip of the extension to which the under-support is annexed is rigid like the one of which it is an extension and the other is supported by a swinging hanger hinged to the overhead beam which permits movement to change the width of the channel; between the edge of the under-support and the adjustable side-strip there is an open space through which the planed boards drop upon the lateral carrier after they have passed beyond the end of the side groove above described. There being no top piece upon the second section of the guide to prevent the boards from tipping they drop by gravity through said open space and as they all drop as soon as they have passed out of the side groove the ends nearest to the machines register, regardless of their lengths. They may be taken at once to the re-saw

or allowed to accumulate in the bin or upon the platform above described. The [84] re-saw has capacity equal to that of two or more planers. The bin or platform contains fenders to prevent an accumulation of boards from chafing the carrier belts. In operation, pieces of timber of the required breadth and double the thickness of weather-boards are passed through the planers and guides and dropped upon the lateral carrier and by it deposited automatically in the bin or upon the platform, with ends uniformly near to the re-saw, from which they are taken by hand and passed, in a direction reverse to the course through the planers, through the re-saw and thence to the trimmer-table, where an operator trims the ends, if necessary, or cuts out knots or defective parts, and they are then passed to the longitudinal carrier by which they are conveyed to the sorting-table. The several operations of surfacing, re-sawing, trimming, and sorting may be, but do not necessarily have to be, in a continuous movement. One or more of the planing-machines may be in operation while the others constituting the battery may be idle or all may be in operation simultaneously and the planing-machines may all be idle while the re-saw performs its function. The guides, lateral conveyor, bin, or platform, re-saw, trimmer-table, longitudinal conveyor and sorting table are placed at different elevations so that gravity assists in the general operation. The merit of novelty and invention is claimed for the entire arrangement of machines; the advantages being economy of space, reduction of the number of persons required to carry

on the work and rapidity. The feature of the combination which is new consists of the two part guide above described. In the title, specifications and claims of the patent, the word "Trip" is used to denominate this important part of the combination. There is manifest originality in this application of that word. I do not find in the dictionary definitions of [85] that word any authority for its use as a noun descriptive of any particular device or thing. By his testimony in this case, the inventor seems to have an indefinite idea of its meaning. In the first five claims of the patent the word "Trip" appears to be applicable, only, to the second section or longitudinal extension of the guide, and each of the other claims refer to it as a "receiving-trip comprising a top guide attached to one of said planer-bed side guides and extending over said channel bottom." This "top guide" is the part of the guide which in this opinion I have denominated the "down-presser," as its function is to prevent the planed lumber from tipping before it has advanced to the proper place for tipping. Therefore, I must assume that the word "trip" in claims 6, 7, and 8 is applicable to so much of the guide as includes the down-presser and the second section or longitudinal extension thereof.

The claims of the patent are of the following tenor:

"1. The combination of a battery of planers or similar wood-finishing machines; a receiving-trip extending longitudinally from the rear of each of said planers, said trips so constructed and placed that

they will retain the stuff as it comes from the planers, in substantially the same plane as it passed through the said planers, until it has passed entirely out of the same; and a lateral conveyor at the rear of said battery of planers and beneath said trips.

2. The combination of a battery of planers or similar woodworking-machines; a receiving-trip extending longitudinally from the rear of each machine, said trips so constructed and placed that they may retain the stuff as it comes from the planers in substantially the same plane as it passes through said machines until it has passed entirely out of the same; a lateral conveyor at the rear of said battery of machines and beneath said trips; and a receptacle at the delivery of said conveyor.

3. The combination of a battery of planers or similar woodworking-machines; a receiving-trip extending longitudinally from the rear of each of said machines; a lateral conveyor located at the rear of said machines and beneath said trips; a receptacle at the delivery end of said conveyor; and a machine to complete the second stage in the process of manufacture, said machine located near one end of said receptacle, and preferably in file line with said battery of planers. [86]

4. The combination of a battery of planers or similar woodworking-machines; a receiving-trip extending longitudinally from the rear of each of said machines; a lateral conveyor located at the rear of said machines and beneath said trips; a receptacle at the delivery end of said conveyor; a machine, or machines, to complete the second stage in the pro-

cess of manufacture, located near one end of said receptacle, and preferably in file line with said battery of planers; and a machine, or machines, to complete the third stage in the process of manufacture located by the side of the last-mentioned machines, and in file line with said battery of planers.

5. The combination of a battery of planers or similar woodworking-machines; a receiving-trip extending longitudinally from the rear of each of said machines; a lateral conveyor located at the rear of said machines and beneath said trips; a receptacle at the delivery end of said conveyor; a machine, or machines to complete the second stage in the process of manufacture located near one end of said receptacle and in file line with said battery of planers; a machine, or machines, to complete the third stage in the process of manufacture located by the side of said last-named machines and in file line with said battery of planers; and a longitudinal conveyor the receiving end of which is located alongside of and below said last-mentioned machine, or between said last-mentioned machines, and the delivery end of which is located above a table.

6. The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood-planer, the bed of which planer has a channel composed of a bottom and side guides; the receiving-trip comprising a top guide attached to one of said planer-bed side guides and extending over said channel-bottom; two deep, side guides registering with the side guides on said planer-bed; and a narrow, bottom guide or ledge attached to one

of said deep side guides and registering with said channel-bottom.

7. The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood-planer, the bed of which planer has a channel composed of a bottom and two side guides; the receiving-trip comprising a top guide attached to one of said planer-bed side guides and extending over said channel-bottom; two deep, side guides registering with the side guides on said planer-bed; a narrow, bottom guide or ledge attached to one of said guides and registering with said channel-bottom; slotted spreaders attached to said deep side guides; and supporting-hangers also attached to said deep side guides.

8. The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood-planer, the bed of which planer has a channel composed of a bottom and two side guides; the receiving trip comprising a top guide attached to one of said planer-bed side guides and extending over said channel-bottom; two deep, side guides registering with the side guides on said planer-bed; a narrow bottom guide or ledge attached to one of said side guides and registering with said channel-bottom; slotted spreaders attached to said deep side guides; and supporting-hangers also attached to said deep side guides, one set of said hangers is attached overhead in a hinge-joint parallel with said guides and the other set is rigidly attached overhead." [87]

For convenience, and to make this opinion lucid,

110 *Puget Sound Mills & Timber Company*

I will restate these claims, using my own descriptive words in lieu of the terms of the patent:

The first claim of the patent is for a combination, the elements of which are:

2. A battery of planing-machines, that is to say, several planing-machines set parallel to each other.

b. The second section or longitudinal extension of the two part guide above described.

c. The lateral carrier above described.

Claim 2 is for a combination, the elements of which are the same as claim 1, and the addition of a receptacle which I have heretofore referred to as a bin or platform. It may be a mere vacant space into which the planed lumber may be deposited by the lateral carrier.

Claim 3 is for a combination, the elements of which are the same as in claim 2, with the addition of the re-saw for dividing the thickness of the boards which is the second stage of manufacture.

Claim 4 is for a combination, the elements of which are the same as in claim 3, with the addition of apparatus for trimming, constituting the third stage in the process of manufacturing weather-boards.

Claim 5 is for a combination, the elements of which are the same as in claim 4, with the addition of a longitudinal conveyor conveniently located to carry the finished boards from the trimming table to the sorting table.

Claim 6 is for a combination, the elements of which are:

d. A single planing-machine the bed of which has

a channel [88] composed of a bottom and two side guides.

e. The down-presser above described.

f. The two side pieces of the second section or longitudinal extension of the two part guide placed in line with and ends butting against ends of the side-strips of the channel on the bed-plate.

g. A narrow under-support annexed to one of said side pieces in line with and abutting the outward end of the bottom piece of the side-groove upon the planer bed heretofore described.

Claim 7 is for a combination, the elements of which are the same as in claim 6, with the additional elements of slotted spreaders adapted to space the side pieces of the second section or longitudinal extension of the two-part guide, and the supporting hangers attached to overhead beams and to said side pieces.

Claim 8 is for a combination, the elements of which are the same as in claim 7, with a more detailed description of attachments to the supporting hangers and guide constituting the means for spacing them as required.

One of the defenses pleaded in the answer is, anticipation, and there has been introduced in evidence several patents antedating the complainant's patent, the most important of which is United States patent No. 299,832, dated June 3, 1884, to W. H. Moore for a machine for making bed slats. This patent is for an invention relating to the manufacture of bed-slats where a bolt of timber having double the thickness required for slats, after being planed on both

sides and both edges moulded, is afterwards divided to make two slats. The patent states that the object of the invention is to take the bolt as it comes from the planer and automatically split it into two slats with a splitting saw and [89] plane off the saw-scarf thus formed, and deliver the finished slats at the end of the machine. This result to be accomplished by a process of operation described as follows:

The bolt, as it comes from the planer, falls across two traveling belts, which carry it off at right angles and deposit it on edge in an open trough, the bottom of which is formed by an endless belt which with the aid of grooved friction-rollers carries it through the operation which divides it into two slats. That apparatus is designed and well adapted to do for bed-slats, all that and more than the complainant's apparatus can do for weather-boards, and the work of manufacturing bed-slats is similar to the operation of making weather-boards.

The substantial difference between the apparatus described in the Moore patent and that described in the complainant's patent is in the adaptability of the latter for delivering, automatically, boards that are long and limber, which the Moore patent lacks. The structure designed by the complainant and described in his patent embodies the general idea of the Moore patent with the additions required for handling automatically material suitable for making weather-boards, therefore, it is an improvement in wood-working machinery, but not a pioneer invention, entitling the patentee to a broad construc-

tion of the claims of his patent, including the right to substitute equivalents for the particular parts of the structures described therein. Chutes for guiding lumber when shoved endwise have been in general use for many years, and all that appears to be original in the complainant's apparatus is, a chute constructed with a side groove along part of its length and an opening in its floor on its opposite side along the remainder of its length, placed in a horizontal position so that lumber shoved through it will be retained [90] flat, straight and level while one edge is clamped in the groove and then dropped horizontally through the floor opening. It is the decision of the Court that the monopoly entitled to protection under the complainant's patent is limited to cover, only, the two part guide constructed according to the specifications of his patent, in combination with a planing-machine and a transverse conveyor.

I hold that the first five claims of the complainant's patent are void for lack of utility, because, without the first section of the guide including the down-presser, which is omitted from said claims, the apparatus is inefficient and impractical. Claims 3, 4, and 5 are also void, because they cover only aggregations of machines operating successively and independently of each other and do not embody patentable combinations. I hold claims 6, 7 and 8 to be valid to the extent above indicated.

By a preponderance of the evidence it has been proved that the defendant adopted and put into use in its mill, apparatus for manufacturing weather-

boards, including the two part guide described in the complainant's patent, but either because of defective construction by reason of which the apparatus did not work satisfactorily, or to avoid infringement, a different form of down-presser was added. The defendant's down-presser is an adaptation of the lever and fulcrum principle. In form it resembles a human foot attached by a pivot pin at the ankle joint to a stanchion, with the heel part toward the planing machine and elevated so as to permit the boards to pass under it, the toe part acting as the down-presser—the power of the lever is effectuated by a suspended weight attached to the heel by a cord looped over an overhead pulley to raise the heel so that the weight presses the toe down and the inclined position of the foot permits the [91] boards to pass under it and, when shoved beyond the toe, to tip and fall from the under-support through the open space between it and the side wall of the chute, down upon the lateral carrier. This form of down-presser is not an exact equivalent for the flat top-piece of the guide described in the complainant's patent because it does not exert continuous pressure upon the traveling boards as they pass through the planing-machine, and is not so well adapted for use in operating upon short pieces and without requiring special adjustment it will act upon boards of varying thickness. The evidence proves that after adding the new down-presser to the apparatus in the defendant's mill, the flat top-piece of the guide was removed, it being superfluous; and it is the opinion of the Court that, when that was

done, the apparatus was so changed as to avoid infringement of complainant's patent.

By the decree to be entered the defendant will be enjoined from again infringing claims 6, 7 and 8 of the complainant's patent by the construction or use of sawmill apparatus, including the two-part guide, and a judgment for nominal damages for past infringement is awarded with costs. The evidence submitted does not afford a basis for estimating damages; therefore only nominal damages can be awarded.

The City of Seattle v. McNamara, 81 Fed. Rep. 863.

C. H. HANFORD,
United States District Judge.

[Endorsed]: Opinion. Filed in the U. S. District Court, Western Dist. of Washington. Jan. 15, 1912. A. W. Engle, Clerk. [92]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Interlocutory Decree.

This cause having been brought on for final hearing upon the pleadings and proofs on the 18th day of September, A. D. 1911, J. W. Kindall and Dorr & Hadley appearing for complainant, and Kerr & McCord appearing for defendant, and counsel for the respective parties having been heard, and the cause having been considered by the Court and a written opinion filed herein on the 15th day of January, A. D. 1912, and thereafter, complainant having filed his petition for a modification of the said written opinion of the Court, with respect to the question of damages, and praying for an accounting and for an order of reference for the purpose of a hearing thereon, which petition has by the Court been granted, and the Court now being fully advised, and in consideration of the premises;

It is hereby adjudged and decreed as follows:

That those certain United States letters patent, issued to George W. Loggie of Bellingham, Washington, the complainant herein, under date of November 27, 1906, and being numbered 837,087, for improvement of Receiving-Trip and Conveyor, are void as to claims numbered one (1), two (2), three (3), four (4), and five (5) thereof; and that said letters patent are good and valid, as respects claims six (6), seven (7) and eight (8) thereof, which said three last-mentioned and valid claims are specifically described in said letters patent as follows, to wit: [93]

CLAIM No. 6:

“The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood-planer, the bed of which planer has a channel composed of a bottom and side guides; the receiving-trip comprising a top guide attached to one of said planer-bed side guides and extending over said channel-bottom; two deep side guides registering with the side guides on said planer-bed; and a narrow, bottom guide or ledge attached to one of said deep side guides and registering with said channel-bottom.”

CLAIM NO. 7:

“The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood-planer, the bed of which planer has a channel composed of a bottom and two side guides; the receiving-trip comprising a top guide attached to one of said planer-bed side guides and extending over said channel-bottom; two deep side guides registering with the side guides on said planer bed; a narrow bottom guide or ledge attached to one of said side guides and registering with said channel-bottom; slotted spreaders attached to said deep side guides; and supporting-hangers also attached to said deep side guides.”

CLAIM NO. 8:

“The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood-planer, the bed of which planer

has a channel composed of a bottom and two side guides; the receiving-trip comprising a top guide attached to one of said planer-bed side guides and extending over said channel-bottom; two deep side guides, registering with the side guides on said planer-bed; a narrow bottom guide or ledge attached to one of said side guides and registering with said channel-bottom; slotted spreaders attached to said deep side guides; and supporting-hangers also attached to said deep side guides, one set of said hangers is attached overhead in a hinge-joint parallel with said guides and the other set is rigidly attached overhead."

That the said complainant, the said George W. Loggie, was the first, true and original inventor of the invention and improvement described and claimed in said letters patent, and particularly recited in the said sixth, seventh and eighth claims thereof.

That ever since the issuance of said letters patent, the said complainant has been and now is the lawful owner thereof. [94]

That defendant has heretofore infringed upon said claims six (6), seven (7) and eight (8) by adopting, constructing and installing in its mill, apparatus for manufacturing weather-boards or cedar siding, including the two part guides or receiving-trips described in said claims of complainant's said letters patent.

It is further ordered, adjudged and decreed that that certain substitution adopted, constructed and installed by the defendant in its mill avoided in-

fringement of complainant's patent, which substitution is described as follows: A down-presser of the lever and fulcrum principle, resembling in form a human foot attached by a pivot pin at the ankle joint to a stanchion, with the heel part toward the planing-machine and elevated so as to permit the boards to pass under it, the toe part acting as the down-presser, the power of the lever being effectuated by a suspended weight attached to the heel by a cord looped over an overhead pulley to raise the heel so that the weight presses the toe down and the inclined position of the foot permits the boards to pass under it, and when shoved beyond the toe, to tip and fall from the under-support through the open space between it and the side wall of the chute, down upon the lateral carrier;

It is therefore further ordered, adjudged and decreed that the Puget Sound Mills & Timber Company, a corporation, defendant herein, its agents, servants and workmen, be, and they are perpetually enjoined for the remainder of the term of the life of said letters patent, from further infringing upon the said letters patent, and from manufacturing or using receiving-trips or conveyors, or any device, containing or embodying the inventions substantially as embraced and described in claims numbered six (6) seven (7) and eight (8), or either of them, [95] in said letters patent numbered 837,087.

That the complainant do recover of the defendant the profits, gains and advantages which the said defendant has derived, received, made or saved since

the 27th day of November, 1906, by reason of said infringement of said sixth, seventh and eighth claims of said letters patent, or any of them, and that complainant do recover from defendant his costs, charges and disbursements in this suit to be taxed, all of which is finally adjudged and decreed.

And it is further adjudged and decreed that an accounting is hereby ordered, and this cause is hereby referred to Honorable Roger S. Greene, as Master in Chancery of this Court, who is hereby appointed *pro hac vice*, to take and state the account of said profits, gains and advantages, and to assess such damages, and to report thereon, with all convenient speed; and the defendant, its directors, trustees, officers, attorneys, clerks, servants and workmen, are hereby directed and required to attend before said Master from time to time as required, and to produce before him such books, papers, vouchers and documents, and to submit to such oral examination as the Master may require.

And that the amount of damages to be recovered and all further questions be reserved until the coming in of the Master's report.

Done in open court this 29th day of January, 1913.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Interlocutory Decree. Filed in the U. S. District Court, Western Dist. of Washington. Jan. 30, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [96]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Petition [of Puget Sound M. & T. Co.] for Appeal.

The above-named defendant, Puget Sound Mills & Timber Company, a corporation, feeling itself aggrieved by the decree entered against it on the 30th day of January, 1913, in the above-entitled action, comes now by its attorneys and petitions this Court for an order allowing it to prosecute an appeal to the Honorable Circuit Court of Appeals for the 9th Circuit under and in accordance with the laws of the United States in that behalf made and provided, and that an order be made fixing the amount of security which the defendant shall give and furnish upon said appeal, conditioned as required by law as in cases where supersedeas and stay of execution are desired, and that upon giving such security, all further proceedings in the above-entitled court be suspended and stayed until the determination of said appeal by the United States Circuit Court of

122 *Puget Sound Mills & Timber Company*

Appeals for the 9th Circuit, and your petitioner will ever pray.

KERR & McCORD,
Attorneys for Defendant.

Service of the foregoing Petition for Appeal is hereby received this the 27th day of February, 1913.

DORR & HADLEY,
J. W. KINDALL,
Attorneys for Complainant.

[Endorsed]: Petition for Appeal. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [97]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Petition [of George W. Loggie] for Appeal.

The above-named complainant, conceiving himself aggrieved by the interlocutory order and decree made and entered on the 30th day of January, 1913, in the above-entitled cause, does hereby appeal from

said interlocutory order and decree to the United States Circuit Court of Appeals for the 9th Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said interlocutory order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the 9th District.

Dated at Seattle, Washington, this 27th day of February, 1913.

DORR & HADLEY,

J. W. KINDALL,

Solicitors for Complainant.

Copy of the within petition for Appeal recd. this 27th day of Feb., 1913.

KERR & McCORD,

Atty. for Deft.

[Endorsed]: Petition for Appeal. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [98]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

**Assignment of Errors [on Appeal of Puget Sound
Mills & Timber Co.].**

Comes now the Puget Sound Mills & Timber Company, a corporation, defendant in the above-entitled cause, and files the following assignments of error upon which it will rely upon the prosecution of its appeal of the above-entitled cause from that decree made and entered in said cause on the 30th day of January, 1913.

I.

The Court erred in decreeing that claim six (6) of the letters patent, which said claim is as follows, to wit:

“CLAIM No. 6:

“The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood-planer, the bed of which planer has a channel composed of a bottom and side guides; the receiving-trip comprising a top

guide attached to one of said planer-bed side guides and extending over said channel-bottom; two deep side guides registering with the side guides on said planer-bed; and a narrow bottom guide or ledge attached to one of said deep side guides and registering with said channel bottom." and is involved in the above-entitled action, was valid for the following reasons: [99]

1. The said claim is void for want of novelty.
2. The said claim is void for want of invention.
3. The said claim is void on account of vagueness, indefiniteness and ambiguity of the letters patent.

4. The said claim is void on account of anticipation by letters patent of the United States No. 685,-467 issued to P. Boyd October 28th, 1901, No. 299,-832 issued to W. H. Moore June 3, 1884, No. 721,-006 issued to T. J. Bray, Jr., February 17, 1903, as well as other devices not patented.

5. The said claim is void on account of having been in use for more than two years prior to the taking out of letters patent, of which the said claim is a part.

6. Said claim is void because of the description not being sufficiently clear.

7. Said claim is void for the reason that it is not based upon the specifications relating to the claims of the letters patent.

8. The said claim is void for the reasons that the letters patent are granted for the improvements on trips and conveyors and contain nothing to show in what said improvement consists, the said claim

being a combination.

9. Said claim is void for the reason that it is not a combination but an aggregation.

10. The said claim is void for the reason that the patentee is not the inventor.

II.

The Court erred in decreeing that claim seven (7) of the letters patent, which said claim is as follows, to wit:

“CLAIM NO. 7:

“The combination with a planer of a receiving-trip which is designed to receive the stuff as it comes from [100] a wood-planer, the bed of which planer has a channel composed of a bottom and two side guides; the receiving-trip comprising a top guide attached to one of said planer bed side guides on said planer *bed*; a narrow bottom guide two deep side guides registering with the side guides on said planer bed; a narrow bottom guide or ledge attached to one of said side guides and registering with said channel-bottom; slotted spreaders attached to said deep side guides; and supporting hangers also attached to said deep side guides.”

and is involved in the above-entitled action, was valid for the following reasons:

1. The said claim is void for want of novelty.
2. The said claim is void for want of invention.
3. The said claim is void on account of vagueness, indefiniteness and ambiguity of the letters patent.
4. The said claim is void on account of anticipation by letters patent of the United States No. 685,-

467 issued to P. Boyd October 28, 1901, No. 299,832 issued to W. H. Moore June 3, 1884, No. 721,006 issued to T. J. Bray, Jr., February 17, 1903, as well as other devices not patented.

5. The said claim is void on account of having been in use for more than two years prior to the taking out of letters patent, of which the said claim is a part.

6. Said claim is void because of the description not being sufficiently clear.

7. Said claim is void for the reason that it is not based upon the specifications relating to the claims of the letters patent.

8. The said claim is void for the reasons that the letters patent are granted for the improvement on trips and conveyors and contain nothing to show in what said improvement consists, the said claim being a combination.

9. Said claim is void for the reason that it is not a combination but an aggregation. [101]

10. The said claim is void for the reason that the patentee is not the inventor.

III.

The Court erred in decreeing that claim eight (8) of the letters patent, which said claim is as follows, to wit:

“CLAIM NO. 8:

“The combination with a planer of a receiving-trip which is designed to receive the stuff as it comes from a wood planer, the bed of which planer has a channel composed of a bottom and two side guides; the receiving-trip comprising a top guide

attached to one of said planer-bed side guides and extending over said channel bottom; two deep side guides registering with the side guides on said planer bed; a narrow bottom guide or ledge attached to one of said side guides and registering with said channel bottom; slotted spreaders attached to said deep side guides; and supporting hangers also attached to said deep side guides; one set of said hangers is attached overhead in a hinge joint parallel with said guides and the other set is rigidly attached overhead."

and is involved in the above-entitled action, was valid for the following reasons:

1. The said claim is void for want of novelty.
2. The said claim is void for want of invention.
3. The said claim is void on account of vagueness, indefiniteness and ambiguity of the letters patent.
4. The said claim is void on account of anticipation by letters patent of the United States, No. 685,467, issued to P. Boyd October 28, 1901, No. 299,832 issued to W. H. Moore June 3, 1884, No. 721,006 issued to T. J. Bray, Jr., February 17, 1903, as well as other devices not patented.
5. The said claim is void on account of having been in use for more than two years prior to the taking out of letters patent, of which the said claim is a part.
6. Said claim is void because of the description not being sufficiently clear.
7. Said claim is void for the reason that it is not [102] based upon the specifications relating to the claims of the letters patent.

8. The said claim is void for the reasons that the letters patent are granted for the improvement on trips and conveyors and contain nothing to show in what said improvement consists, the said claim being a combination.

9. Said claim is void for the reason that it is not a combination but an aggregation.

10. The said claim is void for the reason that the patentee is not the inventor.

IV.

The Court erred in entering a decree out of accordance with the decision theretofore rendered, which said decision was to the effect that the only monopoly to which the patentee was entitled was limited to the two-part guide constructed according to the specifications of the letters patent in combination with the planing machine and the transverse conveyor, and the decree in no wise so limits claims 6, 7 and 8.

Wherefore, the said defendant and appellant prays that the judgment of the said trial Court be reversed and that the said District Court of the United States for the Western District of Washington, Northern Division, be directed to enter a judgment in favor of the defendant.

KERR & McCORD,
Attys. for Defendant.

Service of the foregoing Assignments of Error is hereby accepted on this the 27th day of February, 1913.

DORR & HADLEY,
J. W. KINDALL,
Attorneys for Complainant. [103]

130 *Puget Sound Mills & Timber Company*

[Endorsed]: Assignments of Error. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [104]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

**Assignment of Errors [on Appeal of George W.
Loggie].**

Now comes the complainant in the above-entitled cause, and files with his petition for appeal from the interlocutory order and decree, heretofore entered herein, these his assignments of error:

1. That the Court erred in finding that Claim 1 of complainant's patent No. 837,087 is invalid.

2. That the Court erred in finding that Claim 2 of said patent is invalid.

3. That the Court erred in finding that Claim 3 of said patent is invalid.

4. That the Court erred in finding that Claim 4 of said patent is invalid.

5. That the Court erred in finding that Claim 5

of said patent is invalid.

6. That the Court erred in holding, as set out in that portion of said decree, reading as follows, to wit:

“It is further ordered, adjudged and decreed that that certain substitution adopted, constructed and installed by the defendant in its mill avoided infringement of complainant’s patent, which substitution is described as follows: A down-presser of the lever and fulcrum, resembling in form a human foot attached by a pivot pin at the ankle joint to a stanchion, with the heel part toward the planing machine and elevated so as to permit the boards to pass under it, the toe part acting as the down-presser, the power of the lever being effectuated by a suspended weight attached to the heel by a cord looped over an overhead pulley to raise the heel so that the weight presses the toe down and the inclined position of the foot permits the boards to pass under [105] it and, when shoved beyond the toe, to tip and fall from the under-support through the open space between it and the side wall of the chute, down upon the lateral carrier.”

7. That the Court erred in refusing to grant, and in not granting in said interlocutory decree, an injunction in favor of complainant and against defendant, enjoining further infringement of Claim 1 of said patent.

8. That the Court erred in refusing to grant, and in not granting in said interlocutory decree, an injunction in favor of complainant and against de-

132 *Puget Sound Mills & Timber Company*

fendant, enjoining further infringement of Claim 2 of said patent.

9. That the Court erred in refusing to grant, and in not granting in said interlocutory decree, an injunction in favor of complainant and against defendant, enjoining further infringement of Claim 3 of said patent.

10. That the Court erred in refusing to grant, and in not granting in said interlocutory decree, an injunction in favor of complainant and against defendant, enjoining further infringement of Claim 4 of said patent.

11. That the Court erred in refusing to grant, and in not granting in said interlocutory decree, an injunction in favor of complainant and against defendant, enjoining further infringement of Claim 5 of said patent.

WHEREFORE, this appellant, George W. Loggie, prays that the said interlocutory order and decree of the District Court of the United States for the Western District of Washington, Northern Division, may be reversed by this Honorable Court in respect to the matters herein appealed, and that the said Circuit Court may be directed by the mandate of this Court to enter a decree for an injunction and account, under Claims 1 to 5, inclusive, and each thereof, of the patent No. 837,087, with [106] costs to appellant herein and complainant below.

DORR & HADLEY,

J. W. KINDALL,

Solicitors for Appellant.

Service of copy of the foregoing Assignment of Errors admitted this 27th day of February, 1913.

KERR & McCORD,

Solicitors for Appellee.

[Endorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [107]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Bond [on Appeal of Puget Sound Mills & Timber Co.].

KNOW ALL MEN BY THESE PRESENTS: That we, Puget Sound Mills & Timber Company, a corporation, as principal, and American Surety Company of New York, a corporation, as surety, are held and firmly bound unto George W. Loggie, plaintiff above named, in the sum of Five Hundred (\$500.00) Dollars, to be paid to the said George W. Loggie, his executors, administrators and assigns, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally,

134 *Puget Sound Mills & Timber Company*

and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this the 27th day of February, 1912.

The conditions of the above obligations are such that—

Whereas the defendant above named has appealed to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree made and entered in the above-entitled cause on the 30th day of January, 1913, in the above-named court, and to dissolve the injunction therein granted, which said decree was in favor of the plaintiff and against the defendant, and commanded the said defendant to account for certain profits therein mentioned:

Now, therefore, if the above-named defendant shall prosecute said appeal to effect and answer all the costs and damages, if it shall fail to make good its plea, then this obligation shall be [108] void, otherwise to be and remain in full force, virtue and effect.

Witness our seals and names hereto affixed the day and year first above mentioned.

PUGET SOUND MILLS & TIMBER COMPANY.

By KERR & McCORD,

Its Attorneys.

AMERICAN SURETY COMPANY OF
NEW YORK.

[Seal]

By EDWARD J. LYONS,

Resident Vice-President.

S. H. MELROSE,

Resident Assistant Secretary.

Service of the foregoing Bond is hereby accepted this the 27th day of February, 1913.

DORR & HADLEY,
J. W. KINDALL,

Attorneys for Plaintiff.

The above and foregoing Appeal and Supersedeas Bond is hereby approved on this the 27th day of February, 1913.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Supersedeas Bond. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [109]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Bond on Appeal [of George W. Loggie].

KNOW ALL MEN BY THESE PRESENTS, that we, George W. Loggie, as principal, and Massachusetts Bonding and Insurance Company, as surety, are held and firmly bound unto Puget Sound Mills

136 *Puget Sound Mills & Timber Company*

& Timber Company in the full and just sum of \$250.00, to be paid to said Puget Sound Mills & Timber Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals, and dated this 27th day of February in the year of our Lord, 1913.

Whereas, on January 30, 1913, in the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said court between George W. Loggie, complainant, and Puget Sound Mills & Timber Company, defendant, an interlocutory order and decree was rendered in part against said George W. Loggie, and the said George W. Loggie has obtained an order of said Court allowing an appeal to reverse said interlocutory order and decree, and a Citation directed to the said Puget Sound Mills & Timber Company for its appearance in the United States Circuit Court of Appeals for the 9th Circuit, at San Francisco, California, thirty days from and after the date of said Citation. [110]

Now, the condition of the above obligation is such, that if the said George W. Loggie shall prosecute said appeal to effect, and answer all damages and costs, if he fail to make good his plea, then this obli-

gation to be void; otherwise to remain in full force and virtue.

GEORGE W. LOGGIE,

By J. W. KINDALL,

His Attorney.

MASSACHUSETTS BONDING AND INSURANCE COMPANY.

By F. B. POTWIN,

Surety.

By JOHN J. JAMISON, [Seal]

Attorney in Fact.

The foregoing bond is hereby approved, this 27th day of February, 1913.

EDWARD E. CUSHMAN,

Judge.

Service of the foregoing bond is hereby admitted Feb. 27, 1913.

KERR & McCORD,

Attorneys for Defendant.

[Endorsed]: Appeal Bond. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [111]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

**Order Allowing Appeal of Defendant and Fixing
Amount of Supersedeas Bond.**

The defendant having this date filed its petition for an appeal from the judgment made and entered herein on the 30th day of January, 1913, to the United States Circuit Court of Appeals for the 9th Circuit, together with an assignment of errors, all in due time, and praying that an order be made fixing the amount of security which defendant shall furnish on said appeal, and that upon the giving of such security all proceedings in this Court be stayed, pending the determination of said appeal:

It is hereby ordered, that an appeal is hereby allowed to have said judgment reviewed in the United States Circuit Court of Appeals for the 9th Circuit; and

It is further ordered, that upon the Puget Sound Mills & Timber Company, a corporation, filing with the Clerk of this Court a good and sufficient bond

in the sum of Five Hundred Dollars, to the effect that if the said defendant, Puget Sound Mills & Timber Company shall prosecute the said appeal to effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void; otherwise to remain in full force and effect. Said bond to be approved by the Court, and all further proceedings in this Court, including the operation of the injunction, be, and they are hereby, suspended and stayed until the determination of the said appeal by the Honorable United States Circuit Court of Appeals for the 9th [112] Circuit.

Dated at Seattle, Washington, this the 27th day of February, 1913.

EDWARD E. CUSHMAN,

Judge.

Service of the foregoing order allowing appeal and fixing amount of supersedeas bond is hereby accepted this the 27th day of February, 1913.

DORR & HADLEY,

J. W. KINDALL,

Attorneys for Complainant.

[Endorsed]: Order Allowing Appeal and Fixing Amount of Supersedeas Bond. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [113]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

**Order Allowing Appeal [of Complainant, and Fixing
Amount of Bond].**

Now, on this day, comes said complainant, by his solicitors herein, and files and presents to the Court his assignment of errors and petition for appeal from the interlocutory order and decree heretofore rendered herein, to the United States Circuit Court of Appeals for the 9th Circuit; upon due consideration whereof the Court doth order that said appeal be, and the same is hereby, granted as prayed, and that the amount of the appeal bond be given for costs to be fixed at \$250.00; and now said complainant presents such a bond, conditioned as required by law, which is approved by the Court and filed, and a Citation citing and admonishing said defendant to be and appear at and before said Court of Appeals within thirty days from this date, and signed by the Judge; and it is further ordered that the Clerk of

this Court make out and certify to said Court of Appeals a full, true and complete transcript of the record and proceedings in this cause.

Dated February 27, 1913.

EDWARD E. CUSHMAN,
Judge.

Receipt copy of within Order Allowing Appeal on this the 27th Feb., 1913.

KERR & McCORD,
Attys. for Deft. [114]

[Endorsed]: Order Allowing Appeal. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [115]

**[Order Extending Time to February 27, 1913, to File
Bill of Exceptions.]**

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

It appearing to the Court that a stipulation has been entered into by and between the parties hereto

142 *Puget Sound Mills & Timber Company*

extending the time within which the Bill of Exceptions may be filed until the 27th day of February, 1913;

It is now by the Court ordered that the time within which the Bill of Exceptions in the above-entitled cause may be filed be, and the same is hereby, extended up to and including the 27th day of February, 1913.

Done in open court this 27th day of February, 1913.

EDWARD E. CUSHMAN,

Judge.

O. K.

D. & H.

J. W. K.

[Endorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.
[116]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Order Extending Time [to March 31, 1913] for Filing of Bill of Exceptions.

On the stipulation of the solicitors for the respective parties hereto, and for the reason that the interlocutory order and decree heretofore entered herein was signed by the undersigned Judge of this court in chambers at a time when none of the solicitors were present:

It is ordered that the time for the complainant and his solicitors herein to file Bill of Exceptions herein on his appeal from the said interlocutory order and decree be, and the same is hereby, extended to and including March 31, 1913.

Dated this 27th day of February, 1913.

EDWARD E. CUSHMAN.

O. K.

KERR & McCORD,

Solicitors for Defendant.

[Endorsed]: Order Extending Time for Filing Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.
[117]

[Complainant's Exhibit "B"—Notice, Dated January 23, 1907—George W. Loggie to Puget Sound M. & T. Co.]

WHATCOM FALLS MILL CO.,
BELLINGHAM, WASHINGTON.

Bellingham, Wash., Jany. 23, 1907.

Puget Sound Mills & Timber Co.,
South Bellingham, Wash.

Gentlemen:

The undersigned having a Patent No. 837,087 on a Trip and Conveyor for use behind Planers, or similar machines, and which I understand you are using, desires to notify you that you must discontinue its use, unless arrangement is made with the undersigned patentee.

Yours very truly,
GEO. W. LOGGIE.

[Endorsed]: Complainant's Exhibit "B." Filed May 20, 1909. Peter A. Kimple, Notary Public in and for the State of Washington, Residing at Seattle. [118]

[Plaintiff's Exhibit "A"—Drawings and Specification of Letters Patent No. 837,087, to G. W. Loggie, Patented November 27, 1906.]

[Letters Patent of G. W. Loggie, No. 837,087—
Patented November 27, 1906—See page 12.]

**[Plaintiff's Exhibit "H"—Specification of Invention
by George W. Loggie.]**

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

SPECIFICATION.

TO ALL WHOM IT MAY CONCERN:

Be it known that I, George W. Loggie, a citizen of the United States and a resident of Bellingham in the County of Whatcom and State of Washington have invented certain new and useful Improvements in Receiving-Trips and Conveyors of which the following is a specification:

My invention relates to an improvement in Conveyors for transmitting pieces of lumber from one machine to another during the process of manufacture; and also to an improved Receiving-Trip by which said pieces of lumber may be properly deposited on said conveyors.

The object of my invention is three-fold: To reduce the amount of floor space required in which to conduct the several processes of manufacture. To diminish the number of machines required for said processes. And to diminish the number of men required to carry forward said work.

The application of my invention to the manufacturer of bevel siding is illustrated in the accompanying two sheets of drawings in which similar characters refer to similar parts throughout the several views. (Insert A1.) Fig. 3 is a side elevation of

Fig. 1. Fig. 4 is an end elevation of Fig. 2, and Fig. 5 is a side elevation of Fig. 2.

In Fig's 1 and 3, A and B are portions of the rear ends of the two wood planers. (Sept. 4, '06, per A.)

[123]

Projecting longitudinally from the rear of each of these planers is a receiving-trip which receives each finished board as it comes from the planer and retains it until it has passed entirely beyond the planer bed-plate when it is allowed to drop. Beneath these trips are a number of pulleys which move a series of belts transversely behind the planers forming a lateral conveyor. On this conveyor the boards fall from the trips, and are transferred by it to a receptacle lying parallel with, to the rear, and to one side of said planers.

The combination of a battery of planers or similar woodworking machines; a receiving-trip extending longitudinally from the rear of each of said machines; a lateral conveyor located at the rear of said machines and beneath said trips; a receptacle at the delivery end of said conveyor; a machine, or machines to complete the second stage in the process of manufacture located near one end of said receptacle and in file line with said battery of planers; a machine, or machines, to complete the third stage in the process of manufacture located by the said *of said* last-named machines and in file line with said battery of planers; and a longitudinal conveyor the receiving end of which is located alongside of and below said last-mentioned machine, or between said last-mentioned machines, and the delivery end

of which is located above a table.

The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood planer, the bed of which planer has a channel composed of a bottom and side guides; the receiving-trip comprising a top guide attached to one of said planer-bed side guides and extending over said channel bottom; two deep side guides registering with the side guides on said planer-bed; and a narrow, bottom guide or ledge attached [124] to one of said deep side guides and registering with said channel bottom.

The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood planer, the bed of which planer has a channel composed of a bottom and two side guides; the receiving-trip comprising a top guide attached to one of said planer-bed side guides and extending over said channel bottom; two deep side guides registering with the side guides on said planer-bed; a narrow bottom guide or ledge attached to one of said side guides and registering with said channel bottom; slotted spreaders attached to said deep side guides; and supporting hangers also attached to said deep side guides.

In a transverse conveyor the combination of horizontal parallel shafts; suitable bearings and supports for said shafts; suitable means for supplying a torsional effort to one of said shafts; a number of wheels fixed to each of said shafts, said wheels are regularly spaced and so placed that one wheel on each shaft is in line with a wheel on each of the

other of said shafts forming a set; a belt, chain or similar vehicle on each of said sets of wheels; a supporting board beneath the upper part of each of said vehicles; and belt guards at the delivery end of said conveyor;

In a transverse conveyor the combination of horizontal, parallel shafts; suitable bearings and supports for said shafts; suitable means for supplying a torsional effort to one of said shafts; a number of wheels fixed to each of said shafts, said wheels are regularly spaced and so placed that one wheel on each shaft is in line with one wheel on each of the other of said shafts forming a set; a belt, chain or similar vehicle on each of said sets of wheels; a supporting board beneath the [125] upper part of each of said vehicles; belt guards at the delivery end of said conveyor; and a receptacle at said delivery end.

In a transverse conveyor the combination of two parallel horizontal shafts; bearings for the same; a supporting frame to which said bearings are attached; a number of wheels attached to said shafts, said wheels being regularly spaced so that each wheel on one shaft may pair with a wheel on the other shaft; a belt, chain, or similar vehicle over each of said pairs of wheels; a supporting board beneath the upper side of each of said vehicles; slats between each of said supporting boards; a frame work below said supporting boards and said slats to which they are attached; belt guards, as described, properly secured at the delivery end of said conveyor; a space, platform or receptacle at said de-

livery end; a driving pulley fixed on one of said shafts, and a *driving pulley fixed on one of said shafts; and a driving belt on the said pulley.*

In a longitudinal conveyor the combination of two horizontal shafts; bearings and supports for the same; a wheel on each shaft and fixed to the same; a belt, chain or similar vehicle on said wheels; a supporting board beneath the upper side of said vehicle; deep side-guides attached to said supporting board and extending above the upper side of said vehicle; an inclined apron at the receiving end of said conveyor one end of which is attached between said side guides; and a driving pulley on one of said shafts with a driving belt on the same.

In a longitudinal conveyor the combination of two horizontal shafts; bearings and supports for the same; a wheel on each shaft and fixed to the same; a belt, chain or similar vehicle on said wheels; a supporting board beneath the upper side of said vehicle; deep side-guides attached to said supporting [126] board and extending above the upper side of said vehicle; an inclined apron at the receiving end of said conveyor one end of which is attached between said side guides; a driving pulley on one of said shafts with a driving belt on the same; and an inclined table below the delivery end of said conveyor.

The combination with a planer of the receiving-trip, which is designed to receive the stuff as it comes from a wood planer, the bed of which planer has a channel composed of a bottom and two side guides; the receiving-trip comprising a top guide attached to one of said planer-bed side guides and ex-

tending over said channel bottom; two deep side guides registering with the side guides on said planer bed; a narrow bottom guide or ledge attached to one of said side guides and registering with said channel bottom; slotted spreaders attached to said deep side guides; and supporting hangers also attached to said deep side guides, one set of said hangers is attached over head in a hinge joint parallel with said guides and the other set is rigidly attached over head.

[Endorsed]: The foregoing is a part of Plaintiff's Exhibit "H" filed June 27, 1910, being pages one, two, ten, eleven and twelve and thirteen. [127]

[Communication, Dated August 14, 1906, from Examiner to G. W. Loggie.]

DEPARTMENT OF THE INTERIOR.
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C.

C. T. N.
Aug. 14, 1906.

MAILED

" " "

George W. Loggie,
Care David E. Lain,
Bellingham, Whatcom Co.,
Washington.

PLEASE FIND BELOW A COMMUNICATION
FROM THE EXAMINER, IN CHARGE OF
YOUR APPLICATON for patent for Receiving
Trips and Conveyors, filed June 16, 1906, No.
322,112.

F. I. ALLEN,
Commissioner of Patents.

The brief description of figures 1 and 2 on page 2 is insufficient, both of the plan views should be more clearly described.

The part C of figure 1 does not indicate a "re-saw" as stated and to so describe it is misleading and inaccurate. If a sawing mechanism is located at this point it should be properly shown.

On page 8, line 5 it is not understood what is meant by "house trim."

This application presents two distinct matters of invention, claims 8, 9, 10, 11 and 12 being to a specific construction of conveyor and the remaining claims being to the combination of a so-called receiving trip with a planer or a series of planers.

Conveyors have acquired a distinct status in the arts and industries and in the Office classification from planers or any arrangement of planers or wood-working machinery. Applicant is therefore required to elect between the matter of claims 8 to 12 and all the remaining claims and to confine the application to a single invention.

Claims 6, 7 and 13 are had in form, beginning with the phrase "In a receiving-trip" and then defining a matter of planing construction which is certainly not in the receiving-trip and also merely referring to the specific form of planer bed and channel and merely inferentially including it without positively including it. [128]

This could be remedied by canceling "In" in line 1 of claims 6, 7 and 13 and substituting the combination with a planer of and substituting for "combina-

tion of" line 3 of claim 6, and lines 3 and 4 of claims 7 and 13 the words receiving-trip comprising.

B. N. MORRIS,

WARD.

Examiner Division 29. [129]

[Letter, Dated August 27, 1906—G. W. Loggie to
Commissioner of Patents.]

Serial No. 322,112—Paper No. 2

MAIL ROOM

SEP. 4, 1906.

U. S. PATENT OFFICE.

U. S. PATENT OFFICE,

Sep. 6, 1906

DIVISION XXIX.

Bellingham, Wash., Aug. 27, 1906.

Hon. Commissioner of Patents,

Washington, D. C.

Dear Sir:—

In the matter of my application for a patent for Receiving Trips and Conveyors filed June 16, 1906 No. 322,112 and in reply to Office letter dated Aug. 14, 1906 Petitioner submits the following:

Page 2, line 19 after "planers" add

These machines stand parallel with their rear ends in the same line.

Petitioner believes this amplification sufficient for this part of the specification as the parts of these machines directly connected with my improvement are more particularly described on p. 3 of specification, lines 14–20.

Enclosed please find a photographic copy of sheet 1 of drawings to be held by the Commissioner of

Patents while the drawing of re-saw C is amplified. Will the Hon. Commissioner please return said sheet of drawings to petitioner for this purpose?

“House trim” is a technical designation for interior house finishing material, but as it may be somewhat local, will the Examiner make the following amendment: Page 8 line 4 omit “finishing” Line 5 omit “manufacturing”, “house trim and similar material.” Line 5 put word finishing before “lumber.”

Examiner rules that this application presents two distinct matters of invention and requires applicant to divide the claims. Applicant respectfully holds, while the several parts of the improvement may be considered as being distinct in some sense, yet they [130] are so allied and interdependent as to comprise but one complete invention. In practice one re-saw will cut the output of three planers. The function of the “receiving-trip” is to retain a board as it comes from the planer in a horizontal position until it is entirely free of the planer and then drop it from said horizontal position on to the transverse conveyor beneath. The function of the conveyor is to transport the boards from a battery of such trips laterally and deposit them in a position in line with and in front of the re-saw. It is important that the boards when deposited in front of the re-saw may register at the ends nearest said re-saw in order that the man serving this machine may not be obliged to change his position on the floor and thus be free to devote his whole attention to feeding the machine. Now if

an ordinary trip were used to serve the boards to the conveyor, the distant ends of the boards would first come in contact with the conveyor and the stuff would then be caused to occupy an oblique position on said conveyor and be delivered by the same in an irregular and confused heap, thus failing to accomplish one of the important objects of this improvement. Therefore, the conveyor would be practically useless without a trip substantially as described. Furthermore, the trip as herein described has no great advantage over the ordinary and well known forms of this device except for delivering planed stuff to a conveyor substantially as described.

The longitudinal conveyor also is an important and allied part of the invention as it mechanically delivers the stuff as finished by the trimmers to the grading table with near ends registering.

Therefore, the several distinct parts of this invention are dependent upon each other and united contribute to produce a [131] single result, which is the conveying in a near and regular manner of the output of a battery of wood planers to and from the several finishing machines and finally delivering them in regular order on a grading table. The improvement is a unit in conception, installation and use, and applicant urges that it is well within the last clause of Rule 41, and respectfully requests that the Examiner reconsider his order for a division.

If the Office classification of conveyors is such as to leave no room for such a combination as described and named, possibly the Examiner may suggest a change of name which may bring the improvement

sufficiently within the Office classification and thus avoid the necessity of subjecting applicant to the hardship of dividing what is substantially a unit.

Claim 6, line 1, cancel "In" and substitute, The Combination with a planer of. Line 3 and 4 cancel, "the combination of" and substitute the semicolon and words; the receiving-trip comprising.

Claim 7, line 1, cancel "In" and substitute, The combination with a planer of. Lines 3 and 4 cancel, "the combination of" and substitute the semicolon and words; the receiving-trip comprising.

Claim 13, line 1, cancel "In" and substitute The combination with a planer of. Line 3 and 4 cancel "the combination of" and substitute the semicolon and words ; the receiving-trip comprising.

Claim 10, line 10, after "attached" cancel the *coma* and substitute a semicolon.

Yours Respectfully,

GEO. W. LOGGIE,

By his attorney,

DAVID E. LAIN. [132]

[Communication, Dated September 14, 1906, from
Examiner to G. W. Loggie.]
DEPARTMENT OF THE INTERIOR.
UNITED STATES PATENT OFFICE.
WASHINGTON, D. C.,

C. T. N.

Sept. 14, 1906.

MAILED

“ “ “

George W. Loggie,
Care David E. Lain,
Bellingham, Whatcom Co.,
Washington.

PLEASE FIND BELOW A COMMUNICATION
FROM THE EXAMINER IN CHARGE OF
YOUR APPLICATION, for patent for Receiv-
ing Trips and Conveyors, filed June 16, 1906, No.
322,112.

F. I. ALLEN,
Commissioner of Patents.

In response to the amendment of Sept. 4, 1906:—
Previous criticism of the description of Figures
1 and 2 is repeated.

It is thought that figures 1 and 2 should be de-
scribed as follows: Figures 1 and 2 taken together
represent in plan view an arrangement of machines
embodying my invention.

Merely supplying a blue print, while a proper step
in preparation for further showing of the resaw C,
does not in itself meet the requirement for further
illustration. The drawing can not be returned for
this purpose but applicant should furnish a sketch of

158 *Puget Sound Mills & Timber Company*

the proposed changes for the approval of the Examiner and then have the Office make the changes if satisfactory.

As to claims 8, 9, 10, 11, and 12 the previous requirement as to division must be repeated. These claims are purely for a conveyor. If applicant has made an invention of a conveyor, which so far as defined in these claims is clearly capable of use in other relations than those specified in the other claims, this is clearly a distinct invention from the matter of the other claims and can only be made the subject of a separate patent. The remaining claims involve improvements in wood working machines to which the detail character of the conveyor is utterly immaterial. Claims for the conveyor *per se* are obviously out of place with claims for wood working machine arrangements. [133]

It may be remarked that while the Examiner is not an expert in and has not at hand full information concerning the conveyor art he believes there is nothing patentable *per se* in the construction of the conveyor and as the construction in detail of the conveyor does not affect the combination presented in applicant's structure and covered in the other claims it is not seen how the claims could be redrawn so as to be included in the same application with the other claims.

This being a repetition of the requirement of division, appeal therefrom now lies.

B. N. MORRIS,
Examiner Division 29. [134]

WARD.

[Letter, Dated September 22, 1906—G. W. Loggie to
Commissioner of Patents.]

Serial No. 322,112—Paper No. 4.

A

MAIL ROOM

SEP. 28, 1906.

U. S. PATENT OFFICE.

U. S. PATENT OFFICE,

Oct. 10, 1906.

DIVISION XXIX.

Bellingham, Wash. September 22-1906.

Hon. Commissioner of Patents,

Washington, D. C.,

Dear Sir:—

In the matter of the application of Geo. W. Loggie for a patent for an improvement in receiving Trips and Conveyors files June 16th, 1906 Serial No. 322112, and in reply to Office letter dated September 14th, 1906, applicant requests the following:

Strike out the amendments authorized in my letter of August 27th, 1906 to page 2, line 19 of specification, and add the following: Figs. 1 and 2

A1. : taken together represent in plan view an arrangement of machines embodying my invention.

Enclosed herewith I hand you sketch showing a desired amplification of a portion of Fig. 1 of the drawings in this application. If the suggested amendments to the drawing meets with approval, kindly have the addition made to my original draw-

160 *Puget Sound Mills & Timber Company*

ing, inform me of the expense of same, and I will remit at once.

Strike out Claims 8, 9, 10, 11 and 12 and renumber Claim 13 to be Claim No. 8.

Applicant's request for the reversal of Examiner's ruling in the matter of a division is withdrawn.

Yours respectfully,

GEO. W. LOGGIE.

By his attorney,

DAVID E. LAIN. [135]

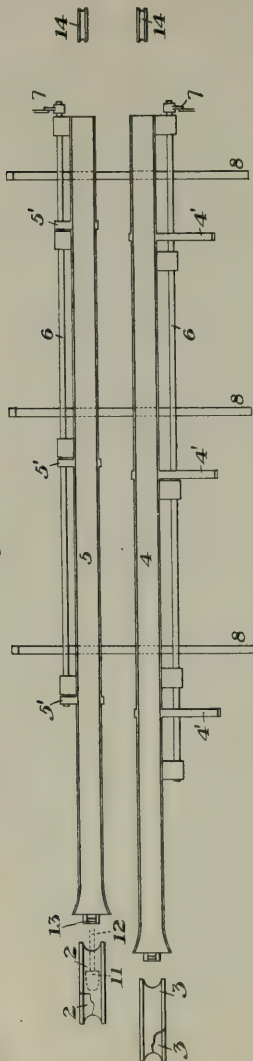
[Defendant's Exhibit No. 6—Drawings and Specification of Letters Patent No. 721,006, Dated February 17, 1903—Thomas J. Bray, Jr.]

T. J. BRAY, JR.
TUBE HANDLING APPARATUS.
APPLICATION FILED SEPT. 2, 1902.

NO MODEL.

3 SHEETS—SHEET 1.

Fig. 1.



WITNESSES

Thomas W. Baxendell
Warren W. Swartz

INVENTOR

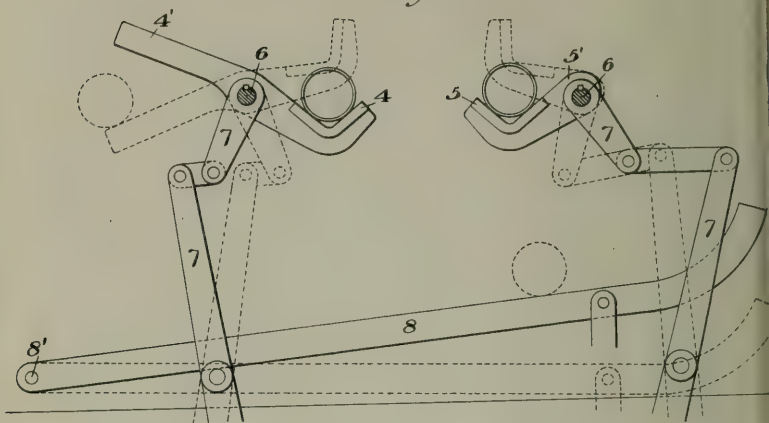
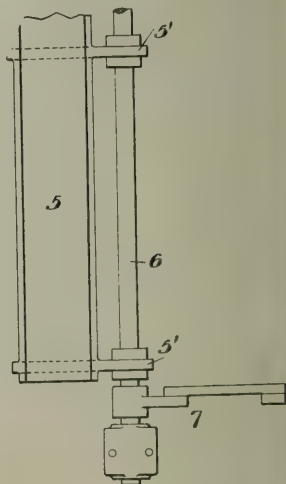
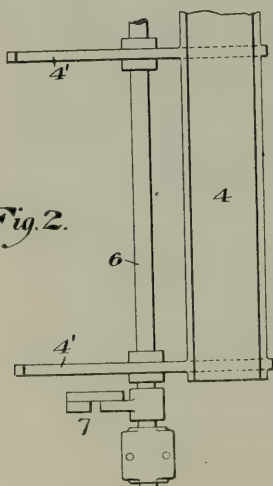
T. J. Bray, Jr.

T. J. BRAY, JR.
TUBE HANDLING APPARATUS.

APPLICATION FILED SEPT. 2, 1902.

NO MODEL.

3 SHEETS—SHEET 1

Fig. 3.*Fig. 2.*

WITNESSES

Thomas W. Baxendell
Warren W. Swartz

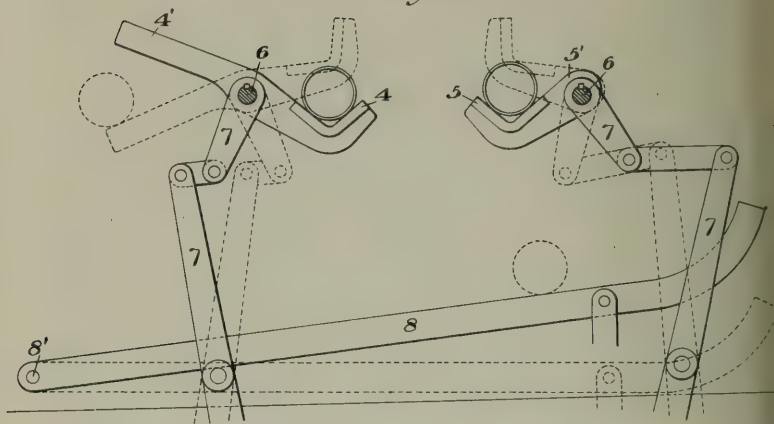
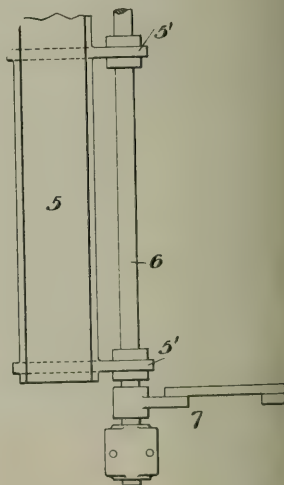
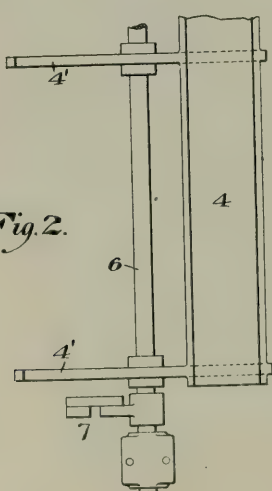
INVENTOR

T. J. Bray Jr

T. J. BRAY, JR.
TUBE HANDLING APPARATUS.
APPLICATION FILED SEPT. 2, 1902.

NO MODEL.

3 SHEETS—SHEET 2

Fig. 3.*Fig. 2.*

WITNESSES

Thomas W. Russell
Warren W. Swartz

INVENTOR

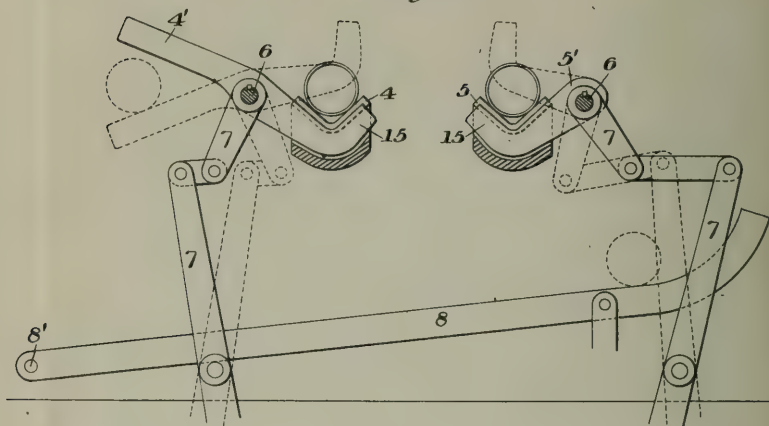
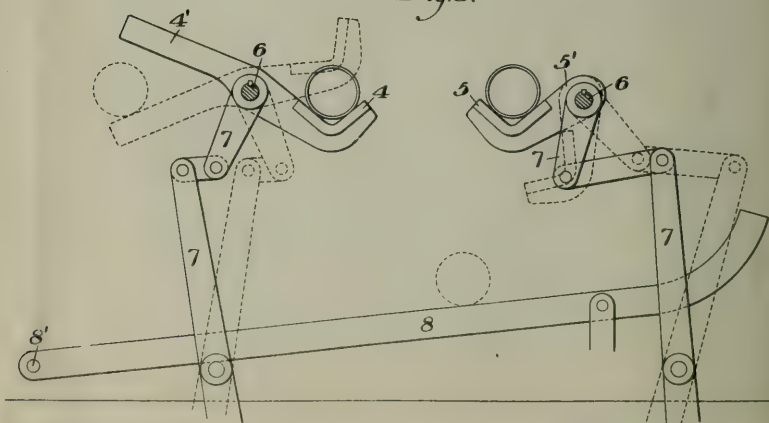
T. J. Bray Jr

T. J. BRAY, JR.
TUBE HANDLING APPARATUS.

APPLICATION FILED SEPT. 2, 1902.

NO MODEL.

3 SHEETS—SHEET 3.

Fig. 4.*Fig. 5.*

WITNESSES

Thomas W. Russell
Warren W. Swartz

INVENTOR

T. J. Bray Jr

THOMAS J. BRAY, JR., OF PITTSBURG, PENNSYLVANIA.

TUBE-HANDLING APPARATUS.

SPECIFICATION forming part of Letters Patent No. 721,008, dated February 17, 1903.

Application filed September 2, 1902. Serial No. 131,815. (No model.)

To all whom it may concern:

Be it known that I, THOMAS J. BRAY, JR., of Pittsburg, in the county of Allegheny and State of Pennsylvania, have invented a new and useful Tube-Handling Apparatus, of which the following is a full, clear, and exact description, reference being had to the accompanying drawings, forming part of this specification, in which—

Figure 1 is a top plan view showing my improved transfer apparatus in the form shown in Fig. 4 in connection with a set of welding-rolls. Fig. 2 is a detail plan view showing one form of the troughs and transfer mechanism. Fig. 3 is an end elevation of Fig. 2. Figs. 4 and 5 are end elevations showing modifications of my invention.

My invention relates to the transferring of welded tubes or pipes to the rollers leading to the sizing-rolls or the returning of the same for reworking; and it is especially designed for use in connection with a furnace having two or more sets of welding-rolls.

The object of the invention is to provide an improved transfer mechanism by which a welded tube may be transferred to the sizing-rolls without interfering with the rod carrying the welding-ball for the other set of welding-rolls or the operation of the other set of rolls, and, further, to provide means for returning second runs by passing them beneath the transfer mechanism.

In the drawings, 2 2 and 3 3 represent two pairs of welding-rolls located side by side and staggered relatively to each other in front of the furnace-opening. In front of these welding-rolls I provide a transfer apparatus, comprising, as shown in Fig. 3, troughs 4 5 for receiving the welded tube from the welding-rolls. These troughs have arms 4' 5' keyed to rock-shafts 6 6, which are adapted to be rocked by suitable systems of levers 7 7, actuated by hand or any suitable motor, so as to raise the troughs from their normal receiving position (shown in full lines in Fig. 3) to their discharging position. (Shown by dotted lines.) An inclined skid 8 or any other suitable transfer device extends from beneath the trough 4 5 to a roller-table 9 in line with the sizing-rolls 10.

In using the apparatus the tubes are passed

through the rolls 2 2 and 3 3 over welding balls and rods. In Fig. 1 I show such welding-ball 11 and rod 12 in connection with the rolls 2 2, the rod 12 being supported at the front end by a usual swinging catch 13. The rods are drawn from the tubes by suitable means—for example, by frictional rolls 14—and to transfer the tube from the trough the rock-shaft is operated by the levers 7 and carries the trough to the elevated position, (shown in Fig. 3,) whereupon the tube rolls from the trough down upon the skid or table 8 and is delivered thereby to the table of the sizing-rolls. The skid 8, which acts as a transfer device, may be pivoted at 8', and if the tube dropped thereon is found to be defective the skid may be reversed by tilting it into the position shown by dotted lines in Fig. 3 and the pipe delivered to the right to be reworked.

The tubes delivered from the trough 5 pass under the companion trough 4. It will be seen that the transfer mechanism does not extend over the troughs, and both transfer mechanisms can be moved at once, as neither can interfere with the operation of the other. The welding-rolls may therefore be used simultaneously, if desired, and this important advantage results from the fact that the tubes are delivered from one transfer-trough beneath and not above the other trough.

In Fig. 4 I show a modification of my invention in which the troughs 4 5 are stationary, but are slotted or interrupted transversely at intervals in their length, and in the spaces or pockets so formed there are transfer-arms 15 15, which are keyed to the rock-shafts 6 6 and are operated by a lever mechanism 7, as above explained. In this case the tubes are delivered by raising the transfer-arms 15, with the same result as in Figs. 2 and 3, where the troughs themselves are raised.

In Fig. 5 I show another modification which operates in the same way as shown in Figs. 2 and 3, except that the trough 5 moves downwardly in delivering the tubes to the skid, and it thus delivers the tube to the left of the shaft 6 instead of the right, as in Figs. 2 and 3.

Other modifications of my invention may be made by the skilled mechanic, the essen-

tial being that the transfer mechanism be constructed to deliver the tubes from one multiple trough under the other trough or troughs for the purpose of preventing interference of one tube with the other.

5 I claim—

1. Tube-welding apparatus, comprising sets of welding-rolls, receiving-troughs therefor, and transfer mechanism constructed to deliver the tubes from one of the troughs laterally under an adjacent trough; substantially as described.

2. Tube-welding apparatus, comprising sets of welding-rolls, receiving-troughs therefor, and transfer mechanism constructed to deliver the tubes from one of the troughs laterally under an adjacent trough, and a transfer

device leading transversely under the said adjacent trough; substantially as described.

3. Tube-welding apparatus, comprising sets of welding-rolls, receiving-troughs therefor, and transfer mechanism constructed to deliver the tubes from one of the troughs laterally under an adjacent trough, and a transfer device leading transversely under the said adjacent trough, said transfer device being reversible to deliver defective tubes in the opposite direction; substantially as described.

In testimony whereof I have hereunto set my hand.

THOS. J. BRAY, JR.

Witnesses:

THOMAS W. BAKEWELL,
GEO. B. BLEMING.

[Endorsed]: Dfts. Ex. 6.

[Defendant's Exhibit No. 7—Drawings and Specification of Letters Patent No. 685,465, Patented October 29, 1901—P. Boyd.]

No. 685,465.

Patented Oct. 29, 1901.

P. BOYD.

STRAIGHTENING TROUGH AND DELIVERY GUIDE TO COOLING TABLES.

Application filed Dec. 20, 1900.

(No Model.)

3 Sheets—Sheet 1.

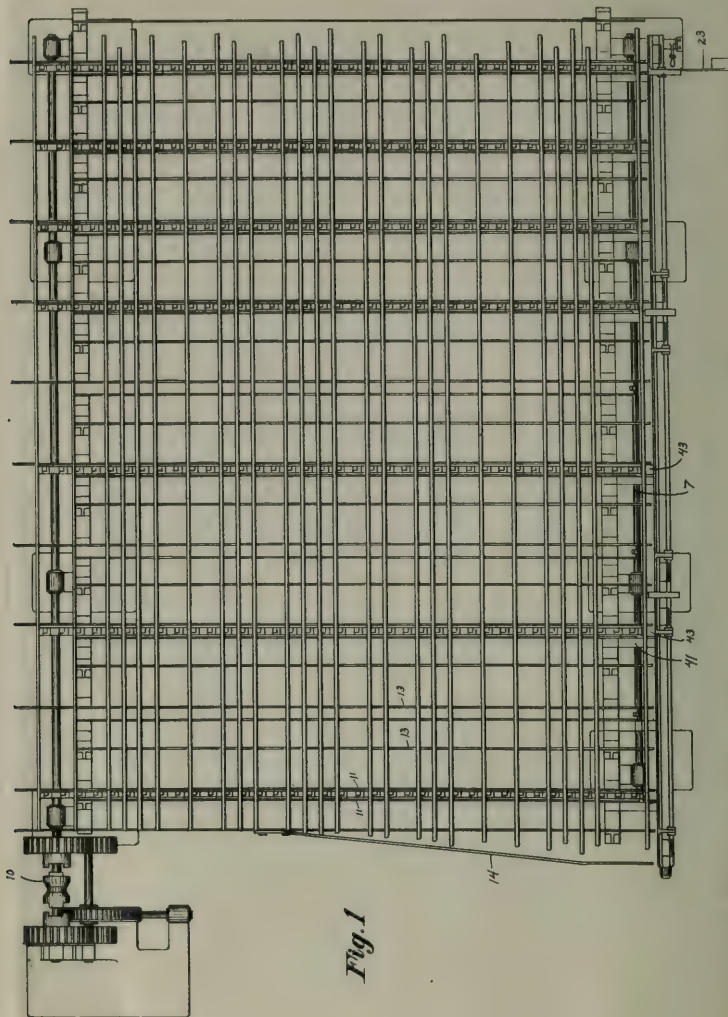


Fig. 1

Witnesses.

Fred D Sweet
Walter L. L. L.

Inventor.

Peter Boyd
By Kay & Lott
Attorneys.

No. 685,465.

Patented Oct. 29, 1901.

P. BOYD.

STRAIGHTENING TROUGH AND DELIVERY GUIDE TO COOLING TABLES.

Application filed Dec. 20, 1900.

(No Model.)

3 Sheets—Sheet 2.

Fig 7



Fig 6

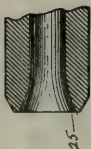


Fig. 2

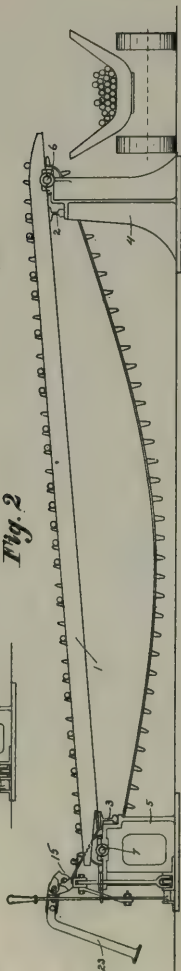


Fig. 4

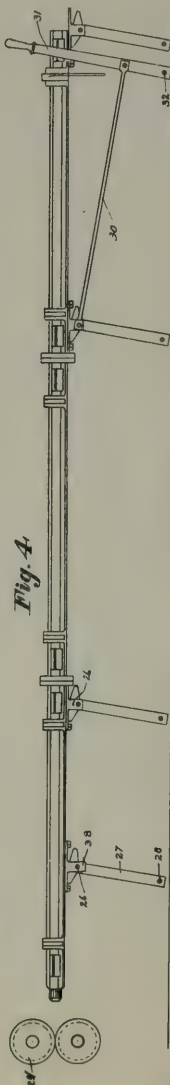
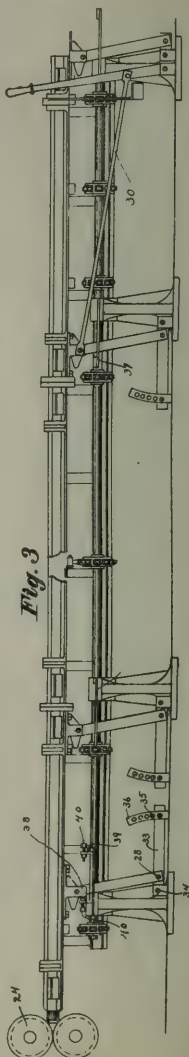


Fig. 3



Witnesses.
Fred D. Lusk
Waterman

Inventor.
Peter Boyd
Ray, Ketchum
Attorneys.

No. 685,465.

P. BOYD.

Patented Oct. 29, 1901.

STRAIGHTENING TROUGH AND DELIVERY GUIDE TO COOLING TABLES.

(Application filed Dec. 20, 1900.)

(No Model.)

3 Sheets—Sheet 3.

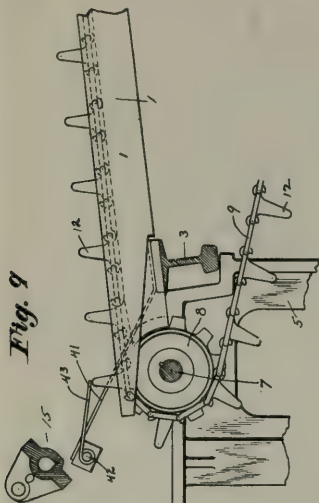


Fig. 9

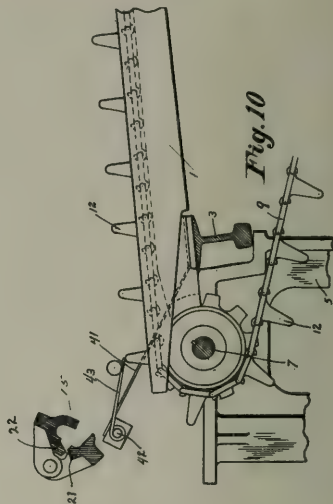


Fig. 10

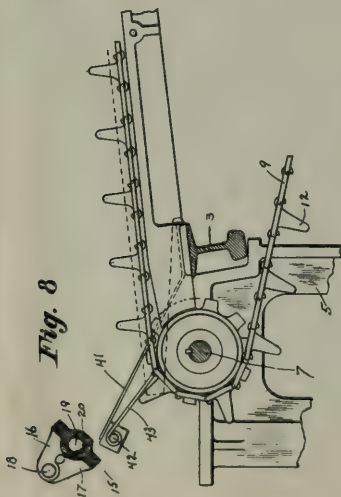


Fig. 8

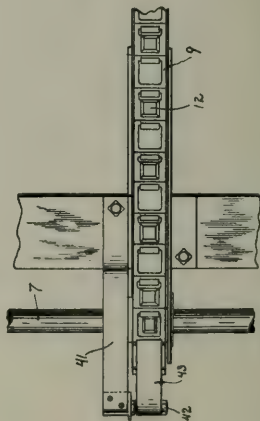


Fig. 11

Witnesses.

Fred D. Sweet
Waterman

Inventor.

Peter Boyd
By Kay & Hatten
Attorneys.

UNITED STATES PATENT OFFICE.

PETER BOYD, OF PITTSBURG, PENNSYLVANIA, ASSIGNOR TO THE NATIONAL TUBE COMPANY, OF NEW YORK, N. Y., A CORPORATION OF NEW JERSEY.

STRAIGHTENING-TROUGH AND DELIVERY-GUIDE TO COOLING-TABLES.

SPECIFICATION forming part of Letters Patent No. 685,465, dated October 29, 1901.

Application filed December 20, 1900. Serial No. 40,470. (No model.)

To all whom it may concern:

Be it known that I, PETER BOYD, a resident of Pittsburg, in the county of Allegheny and State of Pennsylvania, have invented a new and useful Improvement in Straightening-Troughs and Delivery-Guides to Cooling-Tables; and I do hereby declare the following to be a full, clear, and exact description thereof.

My invention relates to a trough for receiving pipes and bars from the sizing-rolls and a guide for delivering the pipes or bars from said trough to the cooling-table, and has for its object devices of the character specified, whereby the pipes or bars will be straightened by the trough as they are received from the sizing-rolls and be automatically delivered to the cooling-table, so that they cannot again become bent, thereby dispensing with the use of cross-rolls or other straightening devices.

In the manufacture of pipes and tubes as heretofore practiced the pipe or tube after being welded was passed through the sizing-rolls and thence to a pair of cross-rolls for straightening the same, after which it was delivered to a cooling-table. The ordinary cooling-table comprises a series of slides arranged in an inclined direction and a series of chains provided with projections, said chains passing over suitably-driven sprocket-wheels at the upper and lower ends of the slides. The pipes rest on the slides, and the projections on the chains carry the pipes or tubes up the inclined slides and deposit them in a car or other suitable device at the upper end. In passing up the inclined slides the tubes or pipes are constantly rotated in order that they may cool uniformly and also to prevent their bending while cooling. With the mechanism heretofore in use it frequently happened that one end of the pipe was delivered to the cooling-table in advance of the other end, and inasmuch as the projections on the various chains of the cooling-table are all in line one end of the pipe was liable to fall in front of a projection on one of the chains, while the other end of the pipe would fall behind the corresponding projection on another of the chains, so that the pipe was bent and carried in this manner up the inclined cooling-table. This necessitated the employment of boys to lift the ends of the

pipes and deposit them in front of the proper projections on the chains; but after a pipe has once been bent by being improperly delivered to the cooling-table it cannot be straightened by this expedient, but it has been found necessary to straighten the pipe by suitable straightening means as soon as it becomes cool enough to handle.

It is the object of my invention to dispense with the cross or other straightening rolls and provide a trough whereby the pipe or tube is received from the sizing-rolls and straightened and also provide means whereby the pipe is delivered from the trough to the cooling-table automatically and in such a manner that one end thereof cannot fall on the chains in advance of the other end, thereby preventing the pipe from becoming bent.

To this end my invention comprises a closed trough for receiving the tube from the sizing-rolls, said trough being of a size internally but slightly larger than the pipe or tube, so that the latter will be straightened as it passes into the trough, said trough being so constructed that it can be readily opened to discharge the pipe therefrom. In connection with this trough I use a fixed guide and a pivoted guide which automatically delivers the pipe from the trough to the cooling-table in such a manner as to prevent one end falling on the chains in advance of the other end.

In the accompanying drawings, Figure 1 is a plan view of the cooling-table and my improved straightening-trough. Fig. 2 is an end view of the same. Fig. 3 is a front view of the cooling-table and trough. Fig. 4 is a detail view showing the trough in its retracted position. Fig. 5 is a detail end view showing the manner of discharging the pipe from the trough. Fig. 6 is a longitudinal section of the front end of the trough. Fig. 7 is a detail of the upper end of the rocker-arm. Fig. 8 is an end view of a portion of the cooling-table and my improved guides. Fig. 9 is a similar view with the chain and pivoted guide in another position. Fig. 10 is a similar view showing a pipe upon the pivoted guide, and Fig. 11 is a plan view of one of the guides and chains.

The cooling-table comprises the slides 1 1, which are mounted on the rails 2 3, secured

to the standards 4 5, the standards 4 being higher than the standards 5, so that the slides 1 are in an inclined position. In the standards 4 is mounted the shaft 6, and in the standards 5 is mounted a similar shaft 7. On these shafts are secured sprocket-wheels 8 8, over which run the chains 9, the latter having their upper reaches lying on the upper surface of the slides 11. The shaft 6 is driven by a suitable motor or engine and can have two rates of motion imparted to it by means of the clutch 10. To the sides of the slides 1 are secured guides 11, which project above the upper face of the slides a distance substantially equal to the thickness of the chains 9, and the pipes or bars in passing up the cooling-table roll on the faces of the guides 11. The chains are provided at intervals with projections 12 for engaging the pipes or bars and carry the same up the cooling-table, the projections on the various chains being in line with each other. Between the slides 1 the table is provided with additional guides 13, which are secured to the rails 2 and 3 and which serve to support the pipes between the guides 11. At one end the table is provided with an inclined plate or guide 14, which projects above the guides 11 and aligns the ends of the pipes or bars.

In front of the cooling-table is mounted the straightening-trough 15, which comprises two longitudinal sections 16 and 17, hinged together, as at 18, said sections having formed therein the opening 19, which is cylindrical through about three-quarters of its circumference, the walls of said opening at the meeting portions of the two sections at the discharge side being formed tangential, as at 20, to permit the pipe passing readily out of said trough when it is opened. The two sections of the trough are provided with cooperating lugs 21 22, which serve to accurately center said sections when closed in case the pivot-pins 18 become worn or loose. The upper section has secured thereto the lever 23, by means of which said section can be raised to open the trough, the weight of the section being sufficient to cause the trough to close when pressure on the lever 23 is removed. The opening 19 in the trough is but slightly larger than the pipe or bar to be received therein, so that as the pipe or bar passes into the trough it is straightened. As a consequence a different trough is necessary with each different size of pipes or bars. The forward end of the trough projects into the pass of the sizing-rolls 24, and the opening 19 in this end of the trough is bell-mouthed, as shown at 25, Fig. 6, and is increased so as to be considerably in excess of the diameter of the pipe, so that the latter can pass readily from the sizing-rolls 24 into the trough. The lower section of the trough is provided with lugs 26, which are pivoted to the upper ends of the rocker-arms 27, the latter being pivoted at their lower ends on the pins 28 and have their upper ends in the form of an arc struck about

28 as a center. To permit the trough 15 moving longitudinally without binding on the upper ends of the rocker-arms, the holes 29 in the lugs 26, through which pass the pins which secure the lugs to the rocker-arms, must either be enlarged or formed triangular or heart-shaped, as shown in Fig. 7. To one of the rocker-arms 27 is secured one end of the connecting-rod 30, the opposite end of which is secured to the lever 31, pivoted to the base at 32. By means of this lever the arms 27 can be rocked and the trough moved toward the sizing-rolls 24 to receive the pipe and then away from said rollers to discharge the pipe from the trough. The lower ends of the rocker-arms 27 are pivoted to the levers 33, the latter having one end pivoted at 34 and having their opposite ends held at any desired height by means of a pin passing through said levers and into any one of the series of holes 35 in the stationary segments 36. By this simple means the rocker-arms and trough supported thereby may be adjusted to any desired height to bring the trough into alinement with the pass of the sizing-rolls, which pass may be higher or lower, according to the size of pipes or bars being produced.

The rocker-arms 27 are guided in their to-and-fro motion by slotted plates 37, secured to the tops of the standards 5. Projecting downwardly from one of the lugs 26 on the lower section of the trough is the finger 38, and the plate 37, by which the corresponding rocker-arm is guided, has its ends turned up, as at 39, and provided with the adjusting-screws 40, which lie in the path of the finger 38 and limit the movement of the trough in both directions, as will be readily understood. By adjusting the screws 40 the movement of the trough can be limited as desired.

Secured to the rail 3 are a series of fixed guides 41, which project upwardly and forwardly and have their outer ends in position to receive the pipes from the trough 15 and guide the latter from said trough to the cooling-table. To the outer ends of these guides are pivoted, by means of pins 42, the leaf-guides 43, the free ends of which lie over the chains 9 of the cooling-table, and as the chains move on the slides 1 the free ends of the guides 43 rise and fall alternately from the position shown in Fig. 8 to that shown in Fig. 9. These guides are for the purpose of preventing the ends of the pipe falling in front of different projections on the chains 9.

In the operation of my device the trough 15 is moved toward the sizing-rolls to the position shown in Fig. 3 and the pipe or tube emerging from said rolls enters the opening in the trough and is straightened thereby. The operator then moves the lever 31, withdrawing the trough from the sizing-rolls to the position shown in Fig. 4, and then places his foot on the end of the lever 23, thereby opening the trough and allowing the pipe to pass out of the same and upon the fixed guides

41. Should the chains all be in the position indicated in Fig. 8, the pipe will pass immediately down the guides 41 until it rests on the guides 11, in which position it will remain until the next projections 12 on the chains 9 contact therewith and roll the same slowly up the cooling-table. Should, however, the chains be in a position so that the projections 12 are about to pass the guides 41, then if one end of the pipe should be in advance of the other there would be liability of said end passing in front of the projection 12 on one of the chains, while the other end of the pipe would not reach the chain until the corresponding projection had passed beyond the guide 41, so that that end of the pipe would fall behind said projection, and as a consequence the pipe would become bent. It is just here that the pivoted guides 43 come into play. As the projections 12 on the chain pass the guides 41 they raise the free ends of the pivoted guides 43 to the position indicated in Fig. 9, so that if in this position a pipe is discharged from the trough and if one end thereof is in advance of the other it will pass down the guide 41 until it reaches the pivoted guide 43, and as the latter is in approximately a horizontal position it checks the forward movement of that end of the pipe until the other end has an opportunity to catch up therewith, and then both ends of the pipe will fall either in front of the projections on the chains or, if these are too far advanced when the pivoted guides drop from said projections, the pipe will fall behind the same and be carried up the cooling-table by the next projections on the chains and in a straight position. It will thus be seen that I provide means for receiving the pipes from the sizing-rollers and straightening the same, which dispenses with the use of cross-rolls and also providing means for automatically delivering the pipes to the cooling-table in such a manner that they cannot again become bent.

While the invention has been described more particularly with reference to the manufacture of tubes and pipes, it is also applicable to the manufacture of solid bars, and I wish it understood that the scope of the claims is intended to cover the latter. Furthermore, while the invention is designed to dispense with cross-rolls or other special straightening devices, nevertheless cross-rolls are sometimes deemed necessary in the manufacture of pipes or bars, not only for the purpose of straightening the pipes or bars, but also for cleaning and scouring the same. I therefore desire it to be understood that my trough may be used in connection with straightening or cross rolls, if desired. The specific manner of mounting the trough is not essential, as it may be mounted upon rollers instead of the rocker-arms shown, only in that case more power would be required to move it. As a matter of fact, the rocker-arms are segments of large rollers. The sections of the trough are so constructed that the pipe

will be readily discharged therefrom and said trough will close automatically, and a further advantage is that if a defective or laminated pipe or bar should stick in the trough the latter can be readily opened to allow the removal of such laminated piece.

What I claim as my invention, and desire to secure by Letters Patent, is—

1. In apparatus for manufacturing pipes and bars, the combination with the sizing-rolls, of a trough having one end projecting into the pass of said rolls and adapted to receive and confine the pipe or bar, and means for ejecting the pipe from said trough.

2. A trough for straightening pipes and bars comprising two longitudinal sections hinged together, and cooperating lugs on said sections adapted to center the same.

3. In apparatus for finishing pipes and bars, the combination with the sizing-rolls, of a trough having one end adapted to project into the pass of said rolls and adapted to receive and confine the pipe or bar, and means for moving said trough toward and from said rolls.

4. In apparatus for manufacturing pipes and bars, the combination with the sizing-rolls, of a trough adapted to receive and confine the pipe or bar, rocker-arms on which said trough is mounted, and means for rocking said arms to move the trough toward and from said rolls.

5. In apparatus for manufacturing pipes and bars, the combination with the sizing-rolls, of a trough adapted to receive and confine the pipe or bar, means for moving said trough toward and from said rolls, and adjustable stops for limiting the movement of the trough.

6. In apparatus for manufacturing pipes and bars, the combination with the sizing-rolls, of a trough adapted to receive and confine the pipe or bar, and means for adjusting said trough vertically.

7. In apparatus for manufacturing pipes and bars, the combination with the sizing-rolls, of a trough adapted to receive and confine the pipe or bar, rocker-arms on which said trough is mounted, levers to which the lower ends of the rocker-arms are pivoted, and means for adjustably supporting one end of said levers.

8. A trough for straightening pipes and bars comprising two sections hinged together, a lever secured to the upper section for opening the same, rocker-arms pivoted to the lower section for supporting the same, and means for adjustably supporting said rocker-arms.

9. In apparatus for manufacturing pipes and bars, the combination with a receiving-trough, cooling-table, and its carrying-chains, of the guides pivoted adjacent the receiving-trough and having their free ends projecting over the carrying-chains of the cooling-table.

10. In apparatus for manufacturing pipes and bars, the combination with the receiving-

4
trough, cooling-table, and its carrying-chains, of the fixed guides extending from the trough to the cooling-table, and the leaf-guides pivoted to the fixed guides and having their free
5 ends projecting over the carrying-chains of the cooling-table and resting thereon.

10 11. In apparatus for manufacturing pipes and bars, the combination with the sizing-rolls and cooling-table, of a trough for receiving the pipe from the rolls and straightening

the same, and automatic guides for directing the pipe from the trough to the cooling-table without liability of bending the same.

In testimony whereof I, the said PETER BOYD, have hereunto set my hand.

PETER BOYD.

Witnesses:

ROBERT C. TOTTEN,
F. W. WINTER.

[Endorsed]: Dfts. Ex. 7.

[Defendant's Exhibit No. 8—Drawings and Specifications of Letters Patent No. 299,832, Patented June 3, 1884—W. H. Moore.]

W. H. MOORE.

MACHINE FOR MAKING BED SLATS.

No. 299,832.

Patented June 3, 1884.

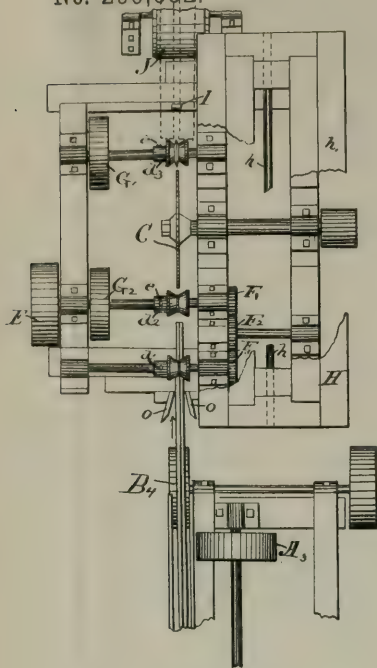
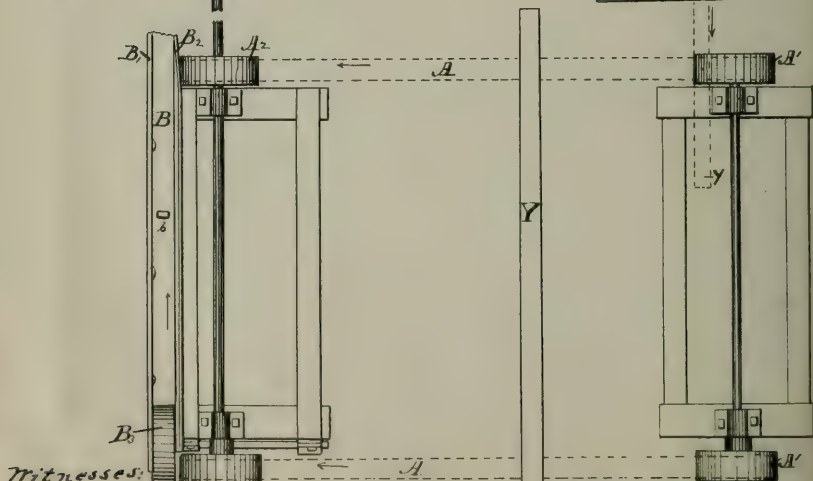
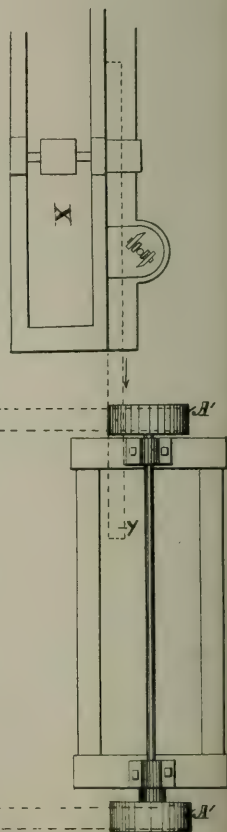


Fig. 1.



Witnesses:

E. H. Roberts
C. E. Shirlwalt

Inventor:
William H. Moore by
J. M. Bates his atty

W. H. MOORE.

MACHINE FOR MAKING BED SLATS.

No. 299,832.

Patented June 3, 1884.

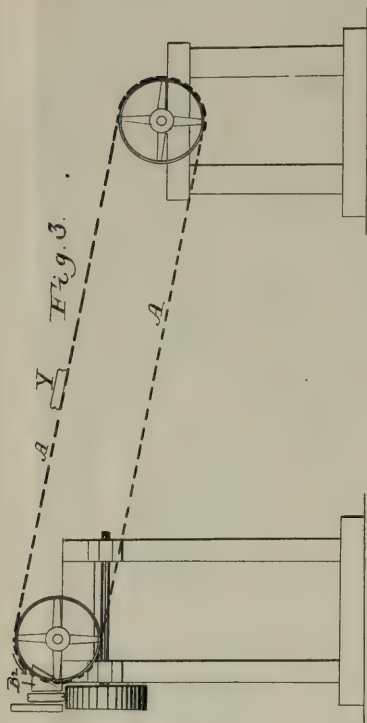
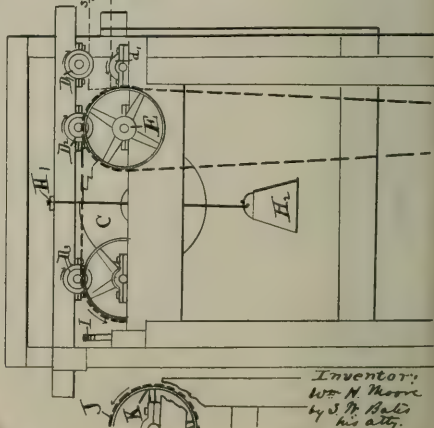
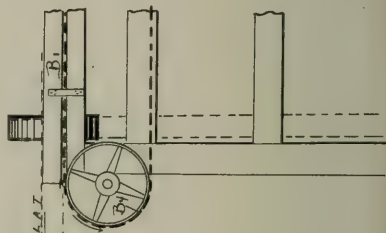
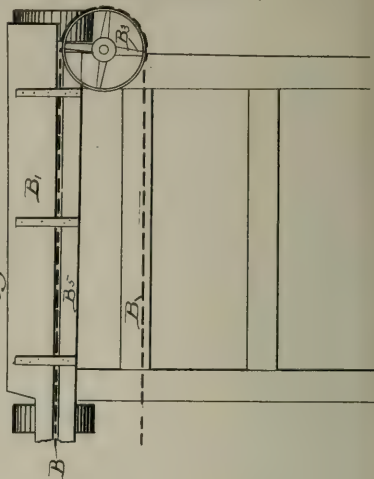


Fig. 2.



Witnesses:
E. W. Roberts,
C. E. Sturtevant.

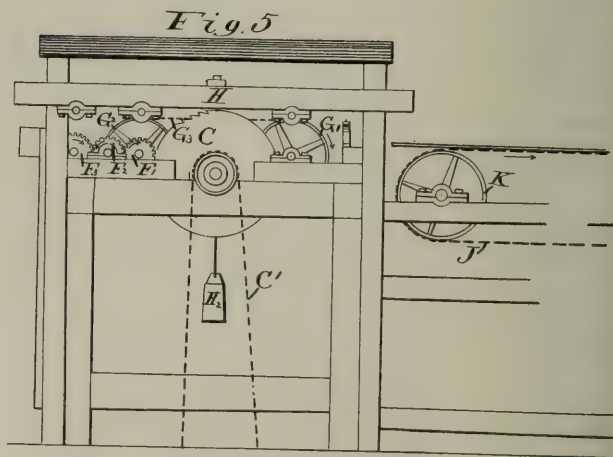
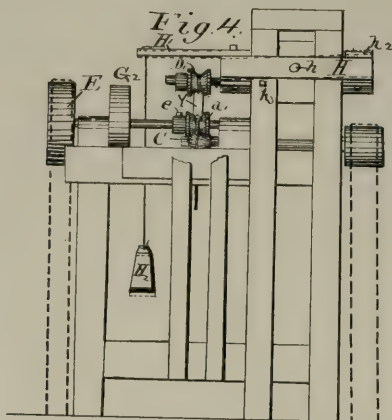
Inventor:
W. H. Moore
by J. M. Bates
his atty.

W. H. MOORE.

MACHINE FOR MAKING BED SLATS.

No. 299,832.

Patented June 3, 1884.



Witnesses:

E. W. Roberts

D. E. Shirlivant

Inventor:

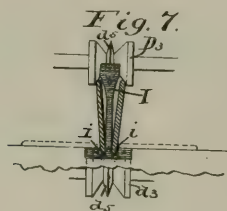
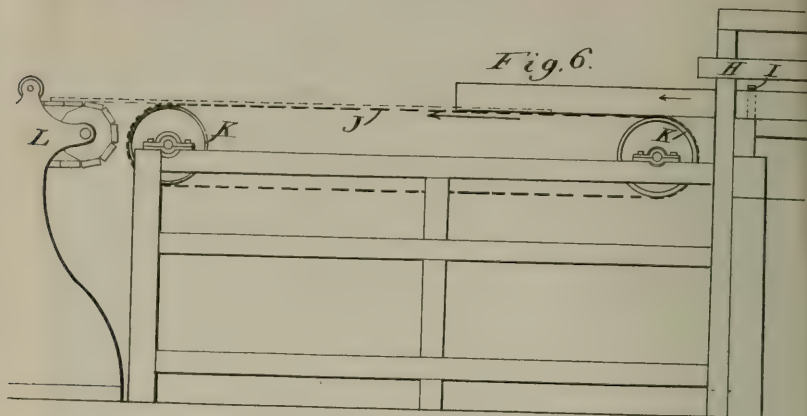
William H. Moore.
by S. M. Bates
his Atty

W. H. MOORE.

MACHINE FOR MAKING BED SLATS.

No. 299,832.

Patented June 3, 1884.



Witnesses:

E. W. Roberts
C. E. Sturtevant

Inventor:

William H. Moore
by S. M. Bates
his atty

UNITED STATES PATENT OFFICE.

WILLIAM H. MOORE, OF GARDINER, MAINE.

MACHINE FOR MAKING BED-SLATS.

SPECIFICATION forming part of Letters Patent No. 299,832, dated June 3, 1884.

Application filed February 27, 1881. (No model.)

To all whom it may concern:

Be it known that I, WILLIAM H. MOORE, a citizen of the United States, residing at Gardiner, in the county of Kennebec and State of Maine, have invented certain new and useful Improvements in Machines for Making Bed-Slats, of which the following is a specification, reference being had therein to the accompanying drawings.

My invention relates to the manufacture of bed-slats where a bolt is used having double the thickness of the required slat, which bolt, having been planed on both sides and molded on both edges, is afterward split, thus forming two slats.

The object of my invention is to take the bolt as it comes from the planer and automatically split it into two slats with a splitting-saw, planing off the saw-scarf thus formed, and delivering the slat at the end of the machine planed on both sides and ready for the market. I accomplish this result by the following successive steps, viz: The bolt, as it comes from the planer, falls across two belts, which carry it off at right angles and deposit it on edge in an open trough, the bottom of which is formed by an endless belt. The motion of this belt carries the bolt along to the splitting-machine, through which it is run by means of grooved friction-rolls. The two slats thus formed from the bolt are made to fall, scarf upward, on a broad feed-belt, which feeds them through a cylinder-planer, where the saw-scarf is planed off.

In the drawings, Figure 1 is a general plan. Fig. 2 is a side elevation of splitting-machine with its feed-belt. Fig. 3 is a side elevation of carrying-belts which take the bolt from the first planer. Fig. 4 is a front elevation of splitting-machine, showing belt passing through. Fig. 5 is a side elevation of splitting-machine, with portion of endless belt leading to cylinder-planer. Fig. 6 is an elevation of same endless belt as in Fig. 5, with portion of cylinder-planer. Fig. 7 is a detail of spreader on splitting-machine.

The arrows show direction of the motion. X is a portion of the planer in which the bolt Y is planed.

A A are two endless belts extending at right

angles to said planer, and so placed that they will receive the bolt as it falls from the machine. The belts A A pass over the pulleys A' A', which are near the planer, and thence over the pulleys A' A', placed on a line with the splitting-machine. The shaft which supports the pulleys A' A' also contains the driving-pulley A', to which power is applied.

B is an endless belt running horizontally over the pulleys B' B' and at right angles to the belts A A. The upper part of the belt B is placed at about the same level as the middle of the pulleys A' A', so that there will be a drop from the end of the belts A, where they pass over these pulleys to the surface of the belt B. Belt B is inclosed by two side pieces, B' and B'', forming a kind of trough, of which the bottom is the moving belt B, which belt has a motion toward the splitting-machine. A stop or dog, b, is attached to the surface of the belt B. That portion of the side piece B' which comes opposite the belts A A is beveled and canted outward in such a manner as to allow the bolt to slide down over it from the top of the pulleys A' A' to the belt B. The corresponding portion of the side piece B'' is made sufficiently high to catch the edges of the bolts as they tip from the top of pulleys A'. The belt B runs over the surface of the bed-piece B'.

Immediately beyond the end of belt B, and in line with it, is placed the splitting-machine, which I class by itself for convenience of description. This machine consists, principally, of the splitting-saw C and the six grooved feed friction-rolls, d' D' d' D' d' D', arranged in pairs, the rolls of each pair being vertically over each other. The lower rolls, d' d' d', are geared and belted together by the gears F' F' F', the pulleys G', G', and E, and the belt G' in such a manner that they all have the same motion which is imparted by the driving-pulley E. The lower rolls are on a level with the top of the endless feed-belt B. The pair of rolls d' D' are each grooved or hollowed out, so that they form between them a recess which is wide in the middle and tapering toward the top and bottom. The rolls d' D' are identical with d' D'. The rolls d' D' are of the same shape as d' D', except that they have turned in the cen-

ter of each groove a cutter or separator, d^2 , which partially separates the recess between the rolls into two parts. The feed-rolls are all provided with set-screws c , which clamp them to the shaft and enable them to be adjusted laterally.

Between the rolls d^2 D² and d^2 D² is the splitting-saw C, driven by the belt C'. The upper rolls, D' D² D², are hung by means of loose shafts to a rocking frame, H, which is pivoted to the frame of the machine by the rods h . That side of the frame H which contains the feed-rolls is weighted by means of the weight H' attached to the lever H'. When the feed-rolls are not in operation, the force of weight H' is supported by the stop h^2 , which is fixed in the side of the machine. The feed-rolls in this case are just far enough apart, so that the bolt as it passes between them will lift the frame from the stop h^2 . Behind the rolls d^2 D² and in line with the saw is the guide or spreader I, Fig. 7. This consists of a thin upright piece somewhat higher than the thickness of the slat and widened out at the top. On each side of the base is a groove, i , so placed as to receive the lower edge of the slat as it comes from the saw and the rolls d^2 D². The width of the upper end of the spreader I is somewhat greater than the distance between the grooves i .

From the rear end of the splitting-machine extends the broad endless belt J, running over the pulleys K K, the upper surface of the belt being level with the bed of the splitting-machine. The pulleys K K are driven by belts connected with the other parts of the machinery.

At the end of belt J, and in line with it, is the cylinder-planer L, the bed of which is on a level with the top of belt J.

Having thus described the construction of my machinery, I now proceed to explain its mode of operation. As the bolt Y comes from the planer X, having there been planed on both sides, it falls across the two belts A A, by which it is carried across and deposited on edge on the endless belt B, being there held upright by the side pieces, B' B². The motion of the belt B carries the bolt toward the splitting-machine, when its end, passing between the guides O O, is seized between the rolls d' D'. If, for any reason, the friction of the belt B should fail to feed the bolt into the rolls, the dog b , as it comes around behind the bolt, starts it along and makes the feed sure. As the end of the bolt is drawn between the rolls d' D' by the revolution of the lower roll, the upper roll, carrying with it the frame H, is slightly raised by the bolt which comes under it, so that free passage for the bolt is allowed. During this the weighted frame bears directly upon the feed-rolls and the bolt. From the rolls d' D' the bolt passes through rolls d^2 D², whence it is fed through the saw and split into two slats. As the two slats thus formed come from the saw, they pass through the rolls d^2 D², the separator d^2 spreading them apart, thus relieving the saw from binding. Leav-

ing the rolls d^2 the slats pass, one on each side of the spreader I, their lower edges confined in the grooves i i , while their upper edges, bearing against the top of spreader I, incline outward. When they are relieved from the grasp of the rolls d^2 D² they fall apart, saw-scarf upward, on the top of the endless belt J, by which they are fed through the cylinder-planer L, where the saw-scarf is planed off. It is designed to have the speed of the belts A A a trifle faster than that of the planer X, that of the feed-belt B faster than belts A A, and so on through the machine, thus preventing clogging.

The arrangement of parts, as here shown, is made to conform to the conditions at my mill; but it is evident that in many cases where the machines could be placed in a line the endless belts A A might be dispensed with by feeding directly from the planer X to feed-belt B.

Hitherto such bolts as I have described have generally been taken from the first planer and fed by hand through a splitting-saw, and have been placed in the market planed only on one side.

In place of the endless belts B and J here shown, I may make use of a series of feed-rolls, all revolving in the same direction, though I consider the method here shown as preferable.

A variety of means may be used for weighting the upper feed-rolls, D' D² D²—such, for instance, as placing them in a weighted frame moving in vertical guides; but the method I show is as convenient as any.

By the use of the feed-rolls here shown I am enabled to split with accuracy bolts which are badly warped, as such bolts often are, the peculiar grooving of the rolls holding them always in an upright position.

The spreading effect of the rolls d^2 D² prevents the saw from binding, as I have before shown, and enables me to use saws with no set to them, and also saws which have become blistered, and which would otherwise have been useless.

I claim—

1. In a machine for splitting bed-slat bolts, the combination of the feed-belt delivering the bolts from the planer lengthwise to the feed-belt B, having guides on each side, with the guides O and the rolls d' D' d^2 D² d^2 D² and saw C, whereby the bolt is delivered to and passed beyond the saw, and the spreader I to separate the split bolt, all substantially as set forth.

2. In a machine, as described, the combination of the endless feed-belt B, which is provided with side guides, B' B², whereby the bolt is delivered lengthwise from said belt, with weighted friction-rolls d' D' d^2 D² d^2 D², whereby said bolts are held in position, and the splitting-saw C, all as set forth.

3. The combination, in a machine, as described, of the feed-belt A, which carries the

bolt sidewise from the planer, with the feed-belt B, having side pieces, B' B', and dog *b*, whereby the bolt is fed lengthwise to the splitting mechanism, all as set forth.

4. In a machine, as described, and in combination with the friction-rolls d' D' d'' D'' and splitting-saw C, the rolls d' D', having the separator *f*, and upright spreader I, having the groove *i* on each side of its face, whereby the two parts of the sawed bolt are separated and set sawed edge up, all as set forth.

5. In a machine, as described, the combination of the rolls d' D', having separator d'' , with the upright spreader I, having grooves *i* on each side of the base, substantially as described.

6. In a machine, as described, for making bed-slats, the combination of the rolls d' D', having separator d'' , and the upright spreader I, having grooves *i* on each side of the base, with a belt and planer, whereby the split bolt

is separated and each part, sawed side up, delivered to the planer, to be smoothed, substantially as described.

7. In a machine, as described, for making bed-slats, the combination of the following elements, viz., a belt from the planer to deliver the planed bolt sidewise to the longitudinally-carrying belt, rolls to receive said bolt, which rolls are properly weighted to hold the bolt while it passes the splitting-saw, the saw, and devices for turning the parts of the split bolt sidewise, and a belt to deliver the bolt-pieces, sawed edge up, to a planer, as set forth.

In testimony whereof I affix my signature in presence of two witnesses.

WILLIAM H. MOORE.

Witnesses:

JOSIAH F. PURINTON,

SIMON K. LITTLEFIELD.

[Endorsed]: Dfts. Ex. 8.

[Letter, Dated October 16, 1906—G. W. Loggie to
Commissioner of Patents.]

Serial No. 322,112—Paper No. 5.

\$50¢ M. O. RECEIVED.

OCT. 22, 1906. J

CHIEF CLERK, U. S. PATENT OFFICE.

U. S. PATENT OFFICE,

Nov. 3, 1906.

DIVISION XXIX.

Bellingham, Washington, Oct. 16-1906.

Hon. Commissioner of Patents,

Washington, D. C.,

Sir:—

Your office letter of September 22nd, noting the acceptance of my amendment to the drawing in the application of Geo. W. Loggie for a patent for an improvement in Receiving Trips and Conveyors, Serial No. 322,112, is received. Enclosed please find Postoffice Money Order for Fifty Cents to cover stated costs for making said amendments to the drawing.

Yours respectfully,

GEO. W. LOGGIE,

By DAVID E. LAIN,

Attorney. [151]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Praeipce for Record on Appeal.

To the Honorable Clerk of the Above-entitled Court.

You will please prepare and certify as a record on appeal in the above-entitled cause, and forward the same to the United States Circuit Court of Appeals for the Ninth Circuit, the following pleadings, orders, decrees, stipulations and exhibits and parts of exhibits on file in your office.

I.

Bill of Complaint.

II.

Answer.

III.

Replication.

IV.

The Bill of Exceptions and Amendments thereto when the same shall have been certified by the Court, and complainant's exceptions to interlocutory decree and order of Court allowing same.

V.

Opinion of the Court.

VI.

Decree. [152]

VII.

Petitions for Appeal.

VIII.

Assignments of Error.

IX.

Appeal Bonds and Approvals.

X.

Orders Allowing Appeals.

XI.

Citations.

XII.

Orders Extending Time Within Which to File
Bills of Exceptions.

XIII.

Plaintiff's Exhibit "A," the same being the letters
patent involved in the above-entitled cause.

XIV.

The following parts of Plaintiff's Exhibit "H."

(a) Pages one, two, ten, the first four lines of
page eleven and page thirteen thereof.

(b) The letter contained in Exhibit "H" from
the United States Patent Office, signed by B. H.
Morris and dated August 14, 1906.

(c) Letter from George W. Loggie from his at-
torney David E. Lain to the Honorable Commis-
sioner of Patents, dated August 27, 1906.

(d) Letter to George W. Loggie from B. N.
Morris dated September 14, 1906.

186 *Puget Sound Mills & Timber Company*

(e) Letter to the Honorable Commissioner of Patents from George W. Loggie, dated September 22, 1906. [153]

(f) Defendant's Exhibit No. 6, the same being the letters patent granted to T. J. Bray, Jr., Feb. 17, 1903, No. 721,006.

(g) Defendant's Exhibit No. 8, same being the letters patent granted to W. H. Moore June 3, 1884, No. 299,832.

(h) Defendant's Exhibit No. 7, same being the letters patent granted to P. Boyd October 28, 1901, numbered 685,465.

(i) Letter from George W. Loggie to the Commissioner of Patents dated October 16, 1906.

XV.

Defendant's Exhibit No. 1.

XVI.

Stipulation Settling Bill of Exceptions or Statement of Case.

XVII.

Order Settling Bill of Exceptions or Statement of Case.

XVIII.

Stipulation and Order Extending Time for Transmitting Record.

XIX.

Stipulation and Order Extending Time to Settle Bill of Exceptions or Statement of Case.

DORR & HADLEY,

J. W. KINDALL,

Attorneys for Complainant.

KERR & McCORD,

Attorneys for Defendant.

[Endorsed]: Praeceptum for Record on Appeal.
Filed in the U. S. District Court, Western Dist. of
Washington. Feb. 27, 1913. Frank L. Crosby,
Clerk. By Ed M. Lakin, Deputy. [154]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Supplemental Praeceptum for Record on Appeal.

To the Honorable Clerk of the Above-entitled Court:

You will please prepare and certify as a part of
the record on appeal in the above-entitled cause, and
forward the same to the United States Circuit Court
of Appeals for the Ninth Circuit, the following ex-
hibits and parts of exhibits on file in your office.

I.

Plaintiff's Exhibit "B," being a letter dated on or
about January 23, 1907, from George W. Loggie to
defendant.

II.

Pages 11 and 12 of Plaintiff's Exhibit "H."

III.

Defendant's Exhibits 2, 3, 4 and 5, being photographs of defendant's mill taken June 21, 1909.

DORR & HADLEY,

J. W. KINDALL,

Attorneys for Complainant.

Due service of within Supplemental Praeipe acknowledged this 27th day of March, 1913.

KERR & McCORD,

Attorneys for Defendant.

[Endorsed]: Praeipe for Record on Appeal. Filed in the U. S. District Court, Western Dist. of Washington. Frank L. Crosby, Clerk. By E. M. L., Deputy. [155]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1640.

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Citation [on Appeal of George W. Loggie (Copy)].

United States of America to Puget Sound Mills & Timber Company, a Corporation, and Kerr & McCord, Its Attorneys, Greeting:

You are hereby notified that in a certain case in equity in the United States District Court, in and

for the Western District of Washington, Northern Division, wherein George W. Loggie is complainant and the Puget Sound Mills & Timber Company, a corporation, is defendant, an appeal has been allowed the complainant therein to the Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in said court at San Francisco, thirty days after the date of this Citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 27th day of February, A. D. 1913.

[Seal]

EDWARD E. CUSHMAN,

Judge.

Service of the foregoing Citation, and receipt of copy thereof is hereby acknowledged this 27th day of February, 1913.

KERR & McCORD,

Attorneys for Defendant. [156]

[Endorsed]: Citation. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [157]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

**Citation [on Appeal of Puget Sound Mills & Timber
Co. (Copy)].**

The President of the United States to George W.
Loggie and Messrs. Dorr & Hadley and J. W.
Kindall, His Attorneys:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the 9th Circuit, to be held in the city of San Francisco, California, within thirty days from the date of this writ, pursuant to an appeal filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, sitting at Seattle, wherein you are the complainant and appellee, to show cause, if any there be, why the judgment in said appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE,
Chief Justice of the Supreme Court of the United
States, this the 27th day of February, 1913.

[Seal]

EDWARD E. CUSHMAN,

Judge.

Service of the foregoing Citation on Appeal is
hereby accepted this 27th day of Feb., 1913.

DORR & HADLEY,

J. W. KINDALL,

Attorneys for Complainant. [158]

[Endorsed]: Citation on Appeal. Filed in the U.
S. District Court, Western Dist. of Washington.
Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed. M.
Lakin, Deputy. [159]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

Appeal [Copy].

The President of the United States to the Honor-
able, the Judge of the District Court for the
Western District of Washington, Northern Di-
vision, Greeting:

Because in the record and proceedings and also in
the rendition of the judgment upon a plea which is

192 *Puget Sound Mills & Timber Company*

in the said Court before you, or some of you, between George W. Loggie, complainant and appellee, and Puget Sound Mills and Timber Company, a corporation, defendant and appellant, manifest error hath happened, to the great prejudice of the said Puget Sound Mills & Timber Company, defendant and appellant, as by its complaint and assignment of errors appears;

We, being willing that error, if any there be, should be duly corrected and full and speedy justice done to the parties aforesaid, in its behalf do command you, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the — day of March, 1913, and within thirty days from the date hereof, in the said Circuit [160] Court of Appeals to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this the 27th day of February, 1913.

[Seal]

FRANK L. CROSBY,
Clerk of the United States District Court for the
Western District of Washington, Northern Division.

United States of America,
Western District of Washington,—ss.

We hereby acknowledge receipt of a true and correct copy of the foregoing Appeal and acknowledge service of said appeal by the receipt of a copy thereof.

DORR & HADLEY and
J. W. KINDALL,
Attorneys for Complainant.

[Endorsed]: Appeal. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.
[161]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 1640.

GEORGE W. LOGGIE,
Complainant and Appellant,
vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,
Defendant and Appellant.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Wash-

ington, do hereby certify the foregoing 161 typewritten pages, numbered from 1 to 161, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, exhibits and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on appeal therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the parties hereto for the preparation and certification of the typewritten transcript of record [162] issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S., as Amended by Sec. 6, Act of March 2, 1905) for making transcript of the record for printing purposes. .	\$74.00
Certificate to certified copy of type- written transcript of record.30
Seal to said certificate.40

\$74.70

I hereby certify that the above cost for preparing and certifying record amounting to \$74.70 has been paid to me by Messrs. Dorr & Hadley and J. W. Kindall, attorneys for complainant and appellant, and Messrs. Kerr & McCord, attorneys for defendant and appellant.

I further certify that I hereto attach and herewith transmit the original Appeal and original Citations issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 22d day of April, 1913.

[Seal]

FRANK L. CROSBY,

Clerk. [163]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1640.

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

**Citation [on Appeal of George W. Loggie
(Original)].**

United States of America to Puget Sound Mills &
Timber Company, a Corporation, and Kerr &
McCord, Its Attorneys, Greeting:

YOU ARE HEREBY NOTIFIED that in a certain case in equity in the United States District

196 *Puget Sound Mills & Timber Company*

Court, in and for the Western District of Washington, Northern Division, wherein George W. Loggie is complainant, and the Puget Sound Mills & Timber Company, a corporation, is defendant, an appeal has been allowed the complainant therein to the Circuit Court of Appeals, for the Ninth Circuit.

You are hereby cited and admonished to be and appear in said court at San Francisco, thirty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 27th day of February, A. D. 1913.

[Seal]

EDWARD E. CUSHMAN,

Judge.

Service of the foregoing citation, and receipt of copy thereof, is hereby acknowledged this 27th day of February, 1913.

KERR & McCORD,

Attorneys for Defendant. [164]

[Endorsed]: Original. No. 1640. In the District Court of the United States for the Western District of Washington, Northern Division. George W. Loggie, Complainant, vs. Puget Sound Mills & Timber Company, a Corporation, Defendant. Citation. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [165]

*In the United States District Court, Western District
of Washington, Northern Division.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

**Citation on Appeal [of Puget Sound Mills & Timber
Co. (Original)].**

The President of the United States to George W.
Loggie and Messrs. Dorr & Hadley and J. W.
Kindall, His Attorneys:

YOU ARE HEREBY CITED and admonished to
be and appear at the United States Circuit Court of
Appeals for the 9th Circuit, to be held in the city of
San Francisco, California, within thirty days from
the date of this writ, pursuant to an appeal filed in
the office of the Clerk of the United States District
Court for the Western District of Washington,
Northern Division, sitting at Seattle, wherein you
are the complainant and appellee, to show cause, if
any there be, why the judgment in said appeal men-
tioned, should not be corrected and speedy justice
should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE,

198 *Puget Sound Mills & Timber Company*

Chief Justice of the Supreme Court of the United States, this the 27th day of February, 1913.

[Seal] EDWARD E. CUSHMAN,
Judge.

Service of the foregoing Citation on Appeal is hereby accepted this 27th day of Feb., 1913.

DORR & HADLEY,
J. W. KINDALL,
Attorneys for Complainant. [166]

[Endorsed]: No. 1640. In the District Court of the United States for the Western District of Washington, Northern Division. George W. Loggie, Complainant, vs. Puget Sound Mills & Timber Company, a Corporation, Defendant. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [167]

*In the United States District Court, Western District
of Washington, Northern Division.*

No. 1640.

(Circuit Court.)

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant,

Appeal [Original].

The President of the United States to the Honorable, the Judge of the District Court for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings and also in the rendition of the judgment upon a plea which is in the said court before you, or some of you, between George W. Loggie, complainant and appellee, and Puget Sound Mills & Timber Company, a corporation, defendant and appellant, manifest error hath happened, to the great prejudice of the said Puget Sound Mills & Timber Company, defendant and appellant, as by its complaint and assignment of errors appears:

We, being willing that error, if any there be, should be duly corrected and full and speedy justice done to the parties aforesaid, in its behalf do command you, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in the State of California, on the — day of March, 1913, and within thirty days from the date hereof, in the said Circuit [168] Court of Appeals to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right

200 *Puget Sound Mills & Timber Company*

and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this the 27th day of February, 1913.

[Seal]

FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washington, Northern Division.

United States of America,

Western District of Washington,—ss.

We hereby acknowledge receipt of a true and correct copy of the foregoing Appeal and acknowledge service of said Appeal by the receipt of a copy thereof.

DORR & HADLEY and

J. W. KINDALL,

Attorneys for Complainant. [169]

[Endorsed]: No. 1640. In the District Court of the United States for the Western District of Washington, Northern Division. George W. Loggie, Complainant, vs. Puget Sound Mills & Timber Company, a Corporation, Defendant. Appeal. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [170]

[Endorsed]: No. 2270. United States Circuit Court of Appeals for the Ninth Circuit. Puget Sound Mills & Timber Company, a Corporation, Appellant, vs. George W. Loggie, Appellee, and George

W. Loggie, Appellant, vs. Puget Sound Mills & Timber Company, a Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed April 24, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1640.

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

**Order Extending Time [to April 28, 1913] for Filing
Record on Appeal.**

This cause came on for hearing before the Court on the written stipulation of the respective parties hereto, stipulating and agreeing that the time for filing the record on appeal in this cause with the clerk of the Circuit Court of Appeals, at San Francisco, California, may be enlarged and extended until and including the 28th day of April, 1913; and the Court

202 *Puget Sound Mills & Timber Company*

having heard the same, and being of the opinion that good cause exists for so extending the time for filing the record herein,

IT IS THEREFORE ordered that the time within which the record on appeal in this cause may be prepared and filed, and the cause docketed with the clerk of the Circuit Court of Appeals at San Francisco, California, shall be and is hereby enlarged and extended until and including the 28th day of April, A. D. 1913.

DONE in open court this 25th day of March, A. D. 1913.

EDWARD E. CUSHMAN,

Judge.

OK.

KERR & McCORD.

[Endorsed]: Original. No. 1640. In the District Court of the United States for the Western District of Washington, Northern Division. George W. Loggie, Complainant, vs. Puget Sound Mills & Timber Company, a Corporation, Defendant. Order Extending Time for Filing Record on Appeal. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 25, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

Eq. GOB-1-10.

No. 2270. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and Including Apr. 28, 1913, to File Record Thereof and to Docket Case. Filed Apr. 24, 1913. F. D. Monckton, Clerk.

Defendent's Exhibit No. 1.

*In the Circuit Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. —.

GEORGE W. LOGGIE,

Complainant,

vs.

PUGET SOUND MILLS & TIMBER COMPANY,
a Corporation,

Defendant.

INTERROGATORY NO. I.

State your name, age, residence and occupation.

INTERROGATORY NO. II.

What was your occupation, and where were you
working in the late '70's and early '80's?

INTERROGATORY NO. III.

If in answer to the preceding question you state
that you were working in a lumber mill, state if you
know who owned that mill.

INTERROGATORY NO. IV.

Were you acquainted with a Mr. Brown as a mem-
ber of the firm owning the mill or connected in any
way therewith? If so, what if you know was his
connection.

INTERROGATORY NO. V.

What sort of lumber was then manufactured at
that mill?

INTERROGATORY NO. VI.

What position did you fill in the mill, if working there, and to what extent were you acquainted or familiar with the machinery, conveyors and carriers therein?

INTERROGATORY NO. VII.

What means were used to convey the lumber through the different processes and on to the loading platform, or into the car? Describe fully.

INTERROGATORY NO. VIII.

Were you acquainted with one James C. Kelley, a millwright, during the time you were working in the mill mentioned in your foregoing answer? If so, state where in the mill he worked if you know.

INTERROGATORY NO. IX.

What device, if you know, was used for transferring railroad ties, or other lumber, from behind a planer to the loading platform or car? Describe its construction and operation as fully as possible.

INTERROGATORY NO. X.

State, if you know, who installed or suggested the device last described.

INTERROGATORY NO. XI.

Examine the blue-print marked "Copy of Defendant's Exhibit One," and state whether any device such as is therein set out, or similar thereto, was used or installed to your knowledge in the mill mentioned in your previous answers. If you answer yea, describe the same fully and in what respect, if any, the device as used differed from the one set out in the blue-print.

INTERROGATORY NO. XII.

Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

EXAMINATION OF WITNESS MARCENA D. SWAN, BEGINNING ON MARCH 7th. 1910, AT MOUNT PLEASANT, MICHIGAN, BEFORE HERBERT A. SANFORD, SPECIAL EXAMINER BY AGREEMENT OF COUNSEL, ON BEHALF OF PLAINTIFF, PURSUANT TO THE ANNEXED STIPULATION.

MARCENA D. SWAN, witness produced in behalf of complainant, being first duly sworn, deposes and says in answer to the annexed interrogatories of like number as follows:

ANSWER TO INTERROGATORY NO. I.

Name—Marsena D. Swan.

Age—fifty-one years.

Occupation—farmer at present.

Residence—Broomfield Township, Isabella County, Michigan.

ANSWER TO INTERROGATORY NO. II.

Working in saw-mill. Was setter, head-sawyer and foreman at different times in saw-mill at Mt. Pleasant, Michigan.

ANSWER TO INTERROGATORY NO. III.

In the seventies Owens & Clinton owned the mill, they sold to I. A. Fancher, and in 1880 or 1881 Albert B. Upton bought it. Thomas Pickard bought one-half interest of Upton and soon thereafter John C. Leaton bought a one-third interest and very soon Pickard sold his interest to Leaton & Upton. They continued to own it until about 1890. I worked in and about said mill all the time that Leaton & Upton owned it and worked there all the time that James G. Kelley worked there.

ANSWER TO INTERROGATORY NO. IV.

I was not acquainted with anyone by the name of Brown who was a member of the firm owning the mill or connected in any way with the same.

ANSWER TO INTERROGATORY NO. V.

The mill cut pine, hemlock and various kinds of hardwood. Cut into inch lumber and dimention stuff. About a certain time in the eighties the mill cut rail-road ties for The Ann Arbor Railroad and some oak bridge ties for The Pere Marquette Railroad.

ANSWER TO INTERROGATORY NO. VI.

At that time in the eighties I was head-setter and I was familiar with the machinery, conveyors and carriers therein and helped to keep them in repair.

ANSWER TO INTERROGATORY NO. VII.

The means used to convey the lumber away from the mill after being sawed was a horse and car. The lumber, slabs and timber was conveyed from the saw on live rollers. The lumber was passed through an

edger and then a set of trimmers and then onto live rollers and conveyed to the horse car. They experimented on cutting railroad ties for The Ann Arbor R. R. Co. and at that time they put up a set of rollers to convey the ties out of the mill to a platform that was erected beside the tramway at the height of a flat car, there to be loaded onto the car by hand. That set of rolls was operated by a belt and pulley; and the same was started and stopped by a tightener operated by a man.

ANSWER TO INTERROGATORY NO. VIII.

I was well acquainted with one James G. Kelley, a mill-wright, during the time I was working in said mill. He was head sawyer, filer, mill-wright and engineer at different times. I worked with him at mill-wright work. He was a good mill-wright and a good all round mill man.

ANSWER TO INTERROGATORY NO. IX.

The devise used to transfer the ties was a set of rollers put in a frame that extended out to the loading platform, from the end of the live rollers where the slab saw was located. The rollers were driven by the use of a belt and pulley which was stopped and started by raising and lowering a tightener. As we did not have a carriage that we could cut less than twelve feet on we had to cut all the tie timber sixteen feet long and then as it came from the saw on the live rollers to the slab sawyer, he had a devise to stop the tie timber at a point eight feet from the end and then he with slab saw cut the tie eight feet, and then as it passed on, the slab sawyer, by means of lowering

the tightener on to a belt it started the rolls and conveyed the ties to the loading platform.

ANSWER TO INTERROGATORY NO. X.

The devise I have described as being used to convey the ties to the loading platform was designed by James G. Kelley and built by Kelley and myself.

ANSWER TO INTERROGATORY NO. XI.

I have examined the blue-print marked "Copy of Defendant's Exhibit One" and attached hereto, and have to say that there was no such devise nor anything similar to it, to my knowledge, in the said mill at any time.

ANSWER TO INTERROGATORY NO. XII.

I don't know of anything further that I can state that is material to the case or that would explain matters more fully than what I have heretofore stated.

MARSENA D. SWAN.

Subscribed and sworn to before me this 7th day of March, 1910.

[Seal]

HERBERT A. SANFORD,
Notary Public.

My commission expires May 6th, 1911.

State of Michigan,

County of Isabella,—ss.

I, HERBERT A. SANFORD, a notary public in and for said State and County, residing at Mount Pleasant, Michigan, hereby certify that the above witness, Marcena D. Swan, was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth. That his deposition was reduced to writing by me in the presence of said witness and

when completed read over to said witness and subscribed by him in my presence and in the presence of such of the parties and counsel as attended. That said deposition was taken pursuant to the annexed Stipulation at the office of Herbert A. Sanford. That the complainant was represented at the taking of said deposition by his counsel I. A. Fanchu, as set forth in the several exhibits recited or offered in evidence, and marked as specially noted in the foregoing deposition. That I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal this 7th day of March, 1910.

[Seal]

HERBERT A. SANFORD,

Notary Public.

My commission expires May 6th, 1911.

Handwritten notes at the top left of the page.

Handwritten notes in the top left quadrant.

Handwritten notes in the top left quadrant.

1	2	3	4
5	6	7	8
9	10	11	12
13	14	15	16
17	18	19	20



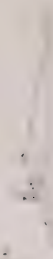
Handwritten notes in the top left quadrant.

Handwritten notes in the top left quadrant.

Handwritten notes in the top left quadrant.

Handwritten notes in the top left quadrant.

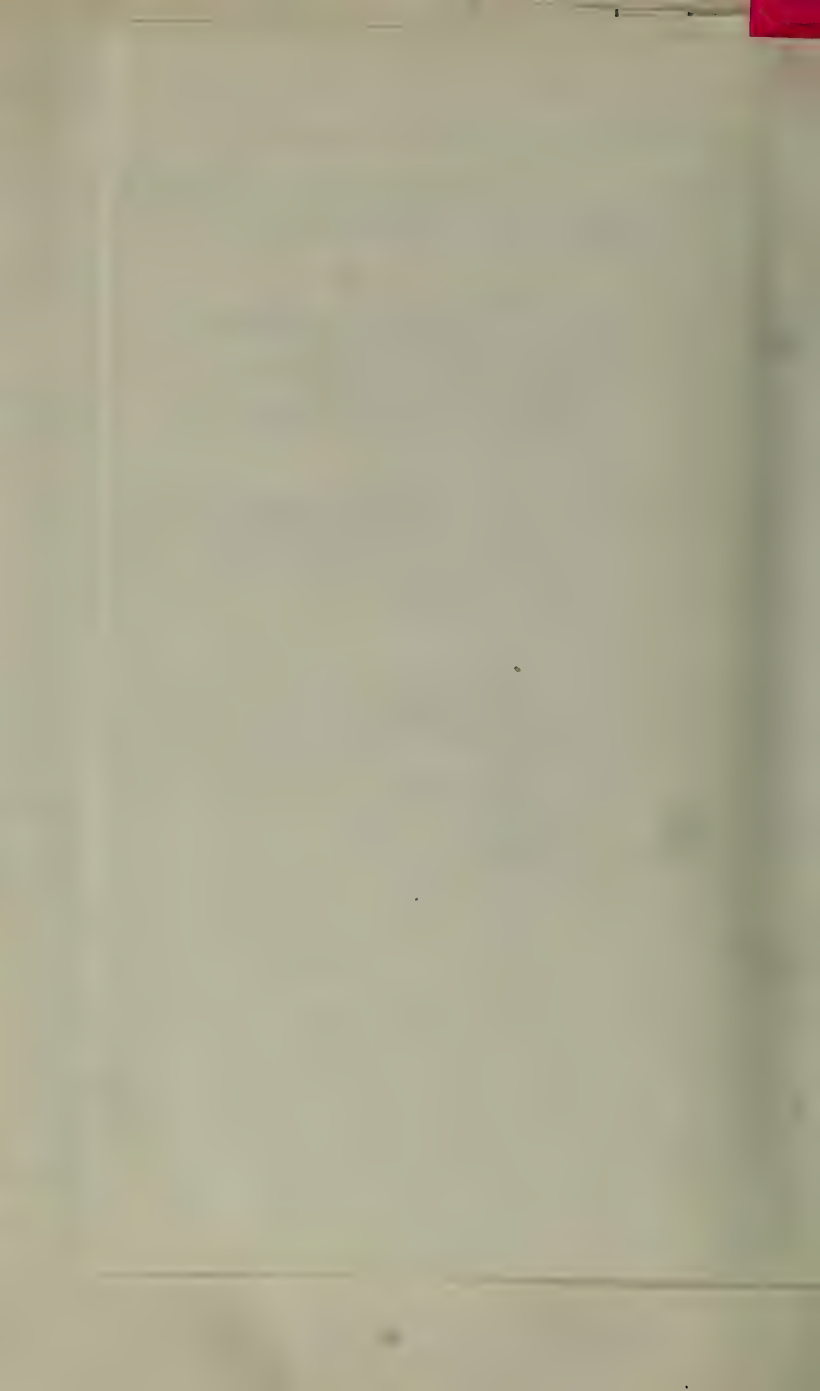
Handwritten notes in the top left quadrant.



Handwritten notes in the bottom right quadrant.

Handwritten notes at the bottom center of the page.

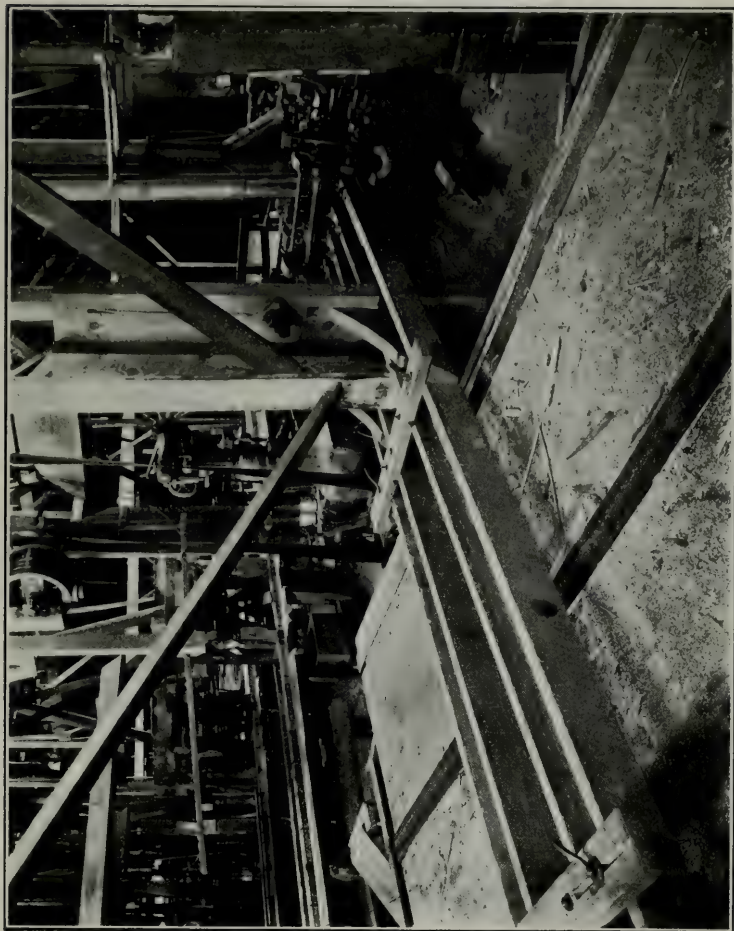
Handwritten notes at the bottom right of the page.



vs. George W. Loggie.

211

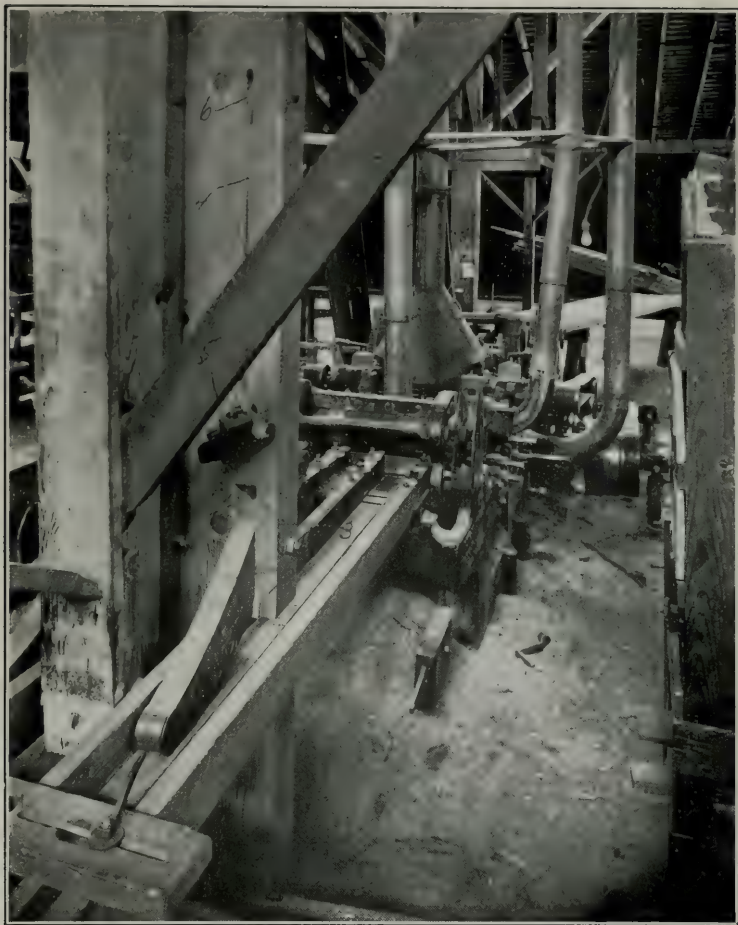
Defendant's Exhibit No. 2.



[Endorsed]: Defendant's Identified Exhibit No. 2. Admitted. J. W. K. Published and Filed U. S. Circuit Court, Western District of Washington. Apr. 1, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

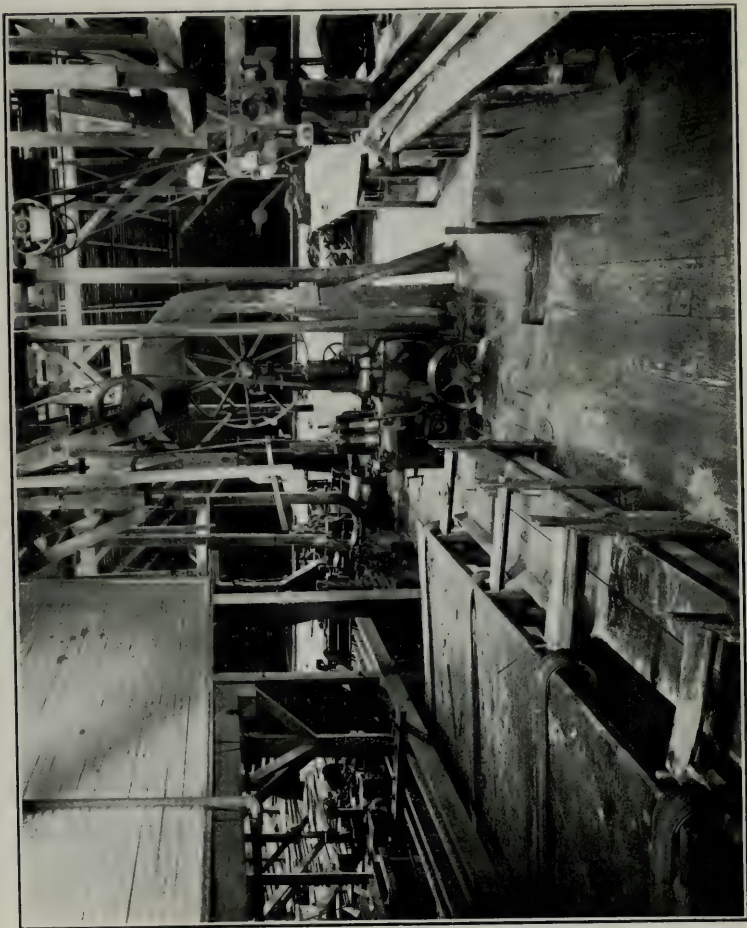
No. 2270. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit 2. Received Apr. 25, 1913. F. D. Monckton, Clerk.

Defendant's Exhibit No. 3.



[Endorsed]: Defendant's Identified Exhibit No. 3.
Admitted. J. W. K. Published and Filed U. S.
Circuit Court, Western District of Washington.
Apr. 1, 1911. Sam'l D. Bridges, Clerk. W. D. Cov-
ington, Deputy.

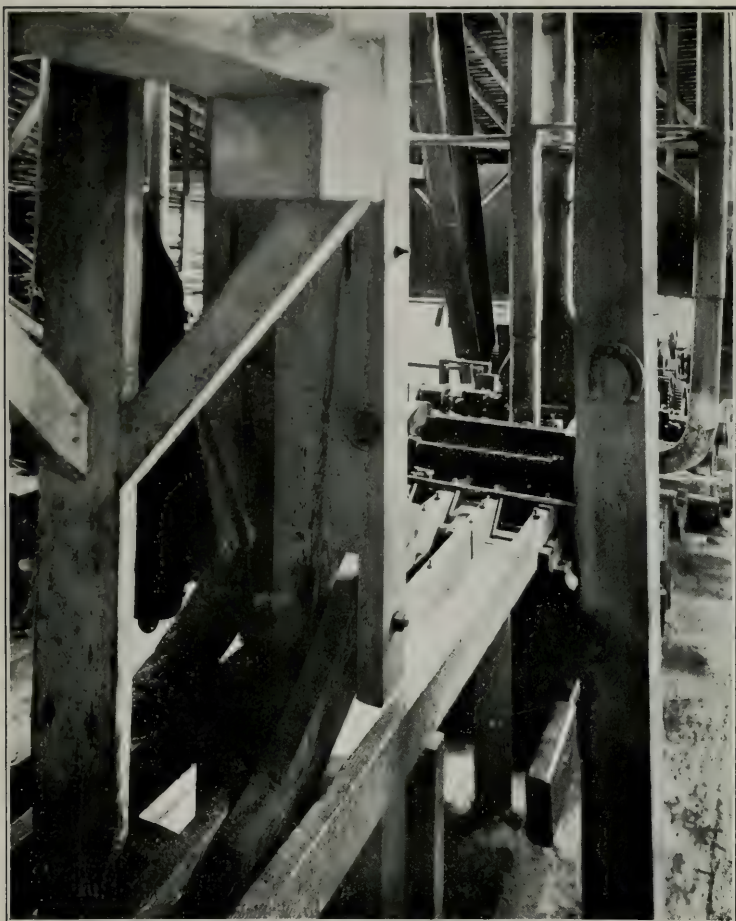
No. 2270. U. S. Circuit Court of Appeals for the
Ninth Circuit. Defendant's Exhibit 3. Received
Apr. 25, 1913. F. D. Monckton, Clerk.



[Endorsed]: Defendant's Identified Exhibit No. 4. Admitted. J. W. K. Published and Filed U. S. Circuit Court, Western District of Washington. Apr. 1, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

No. 2270. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit 4. Received Apr. 25, 1913. F. D. Monekton, Clerk.

Defendant's Exhibit No. 5.



[Endorsed]: Defendant's Identified Exhibit No. 5. Admitted. J. W. K. Published and Filed U. S. Circuit Court, Western District of Washington. Apr. 1, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

No. 2270. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit 5. Received Apr. 25, 1913. F. D. Monckton, Clerk.

30

